Course Reader - Volume 1

Monday, January 13th

- Thomas Hilbink, *The Profession, The Grassroots and the Elite: Cause Lawyering for Civil Rights and Freedom in the Direct Action Era*, in <u>Cause Lawyers and Social</u> <u>Movements</u> (Sarat and Scheingold eds., 2006)
- Michael Grinthal, Power With: Practice Models for Social Justice Lawyering, 15 U. Pa. J. L. & Soc. Change 25 (2011)
- Robert M. Cover, Foreword: Nomos And Narrative, 97 Harv. L. Rev 4 (1983), excerpts

Tuesday, January 14th

- Jules Lobel, <u>Success without Victory: Lost Legal Battles and the Long Road to Justice in</u> <u>America</u> (2003), Introduction
- Bill Quigley, 20 Tools for Movement Lawyering
- Center for Constitutional Rights, *Creative Legal Strategies*
- Center for Constitutional Rights, *How We Define Victory*
- New Chemical Complex Would Displace Suspected Slave Burial Ground in Louisiana's "Cancer Alley", Intercept, December 18, 2019
- ALEC Attacks: How Evangelicals and Corporations Captured State Lawmaking to Safeguard White Supremacy and Corporate Power, the Center for Constitutional Rights, Dream Defenders, Palestine Legal, The Red Nation, and the US Campaign for Palestinian Rights, December 3, 2019

THE SUPREME COURT 1982 TERM

FOREWORD: NOMOS AND NARRATIVE

Robert M. Cover^{*}

A. A violent order is disorder; and B. A great disorder is an order. These Two things are one. (Pages of illustrations.) — Wallace Stevens¹

I. INTRODUCTION

We inhabit a *nomos* — a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.² The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.³ For every constitution there is an epic, for each decalogue a scripture.⁴ Once understood in the context of the narratives

¹ W. STEVENS, *Connoisseur of Chaos*, in THE COLLECTED POEMS OF WALLACE STEVENS 215 (1954).

² On the idea of "world building" with its normative implications, see, for example, P. BERGER, THE SACRED CANOPY (1967); P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUC-TION OF REALITY (1966); J. GAGER, KINGDOM AND COMMUNITY (1975); K. MANNHEIM, IDE-OLOGY AND UTOPIA (1936); cf. P. BERGER, supra, at 19 & passim (invoking the idea of a "nomos," or "meaningful order").

³ I do not mean to imply that there is an official, privileged canon of narratives. Indeed, although some canons, like the Bible, integrate legal material with narrative texts, modern legal texts (with the possible exception of some court opinions) do not characteristically do so. It is the diffuse and unprivileged character of narrative in a modern world, together with the indispensability of narrative to the quest for meaning, that is a principal focus of this Foreword.

⁴ Prescriptive texts change their meaning with each new epic we choose to make relevant to them. Every version of the framing of the Constitution creates a "new" text in this sense. When the text proves unable to assimilate the meanings of new narratives that are nonetheless of constitutive significance, people do create new texts — they amend the Constitution. Thus, the

^{*} Chancellor Kent Professor of Law and Legal History, Yale University.

I wish to thank Boris Bittker, Robert Burt, Harlon Dalton, Mirjam Damaska, Perry Dane, Owen Fiss, Jack Getman, Paul Gewirtz, Michael Graetz, Henry Hansmann, Geoffrey Hazard, Leon Lipson, Jerry Mashaw, Peter Schuck, Avi Soifer, Harry Wellington, Stan Wheeler, and Steve Wizner for generous assistance at various stages in the preparation of this Foreword. I also profited from comments by many colleagues at a Yale Faculty work-in-progress session. I am indebted to Suhn-Kyoung Hong, Yale J.D. 1985, and to Elyn Saks, Yale J.D. 1986, for research assistance in the preparation of the Foreword.

5

that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse — to be supplied with history and destiny, beginning and end, explanation and purpose.⁵ And every narrative is insistent in its demand for its prescriptive point, its moral. History and literature cannot escape their location in a normative universe,⁶ nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.⁷

This *nomos* is as much "our world" as is the physical universe of mass, energy, and momentum. Indeed, our apprehension of the structure of the normative world is no less fundamental than our appreciation of the structure of the physical world. Just as the development of increasingly complex responses to the physical attributes of our world begins with birth itself, so does the parallel development of the responses to personal otherness that define the normative world.⁸

adoption of the 13th, 14th, and 15th amendments may be seen as the creation of new texts to fit new constitutive epics. But other ways of creating texts may be less "official" and more dangerous. A deep division about the constitutive epics may lead to secessionist prescriptive texts — competing prescriptions to go with the competing narratives. Compare CONFEDERATE STATES OF AM. CONST. art. IV, § 2, cl. 1 (providing that a slave may not become free by transit in free territory), with U.S. CONST. art. IV, § 2, cl. 3 (fugitive slave clause). For the narrative context of this prescriptive conflict, see R. COVER, JUSTICE ACCUSED 86-88, 284 n.10 (1975).

⁵ This point is similar if not identical to that made by the late Lon Fuller in L. FULLER, THE LAW IN QUEST OF ITSELF (1940).

⁶ See, e.g., White, The Value of Narrativity in the Representation of Reality, in ON NAR-RATIVE I, 20 (W. Mitchell ed. 1981) ("The demand for closure in the historical story is a demand, I suggest, for moral meaning, a demand that sequences of real events be assessed as to their significance as elements of a moral drama."); see also id. at 23 (suggesting that the demand for closure in the representation of "real events" "arises out of a desire to have real events display the coherence, integrity, fullness, and closure of an image of life that is and can only be imaginary").

⁷ There is a thick contextuality to all moral situations. *Cf.* C. GEERTZ, THE INTERPRETATION OF CULTURES 5 (1973) ("[M]an is an animal suspended in webs of significance he himself has spun."). For discussions of the "social texts" that form these contexts, see C. GEERTZ, NEGARA (1980); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). On the agonistic circumstances of all interpretation, see H. BLOOM, THE ANXIETY OF INFLUENCE (1973). The thick context of literary and political theory is examined in Q. SKINNER, FOUNDATIONS OF MODERN POLITICAL THOUGHT (1978). On the central place of history and the human person in any account of law, see J. NOONAN, PERSONS AND MASKS OF THE LAW (1976).

⁸ See, e.g., E. ERIKSON, CHILDHOOD AND SOCIETY 247 (1950); L. KOHLBERG, THE PHI-LOSOPHY OF MORAL DEVELOPMENT (1981); J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1932); J. PIAGET, PLAY, DREAMS AND IMITATION IN CHILDHOOD (1962). For an extended theoretical definition of the implications of "otherness," see 1-3 J. BOWLBY, ATTACHMENT AND LOSS (1969–1980), especially 1 *id.* at 177–298 (1969). It is instructive to note the structural similarity of theories of development, such as those of Piaget, Erikson, Bowlby, and Kohlberg,

1983]

HARVARD LAW REVIEW

The great legal civilizations have, therefore, been marked by more than technical virtuosity in their treatment of practical affairs, by more than elegance or rhetorical power in the composition of their texts, by more, even, than genius in the invention of new forms for new problems. A great legal civilization is marked by the richness of the *nomos* in which it is located and which it helps to constitute.⁹ The varied and complex materials of that *nomos* establish paradigms for dedication, acquiescence, contradiction, and resistance. These materials present not only bodies of rules or doctrine to be understood, but also worlds to be inhabited. To inhabit a *nomos* is to know how to *live* in it.¹⁰

The problem of "meaning" in law — of legal hermeneutics or interpretation — is commonly associated with one rather narrow kind of problem that confronts officials and those who seek to predict, control, or profit from official behavior.¹¹ A decision must be made

that include emotional, social, and moral components. All stress a system in which development is from a physiological, somatic dependence or interdependence to an awareness of abstract and cultural artifacts. A similar development is entailed in the acquisition of a concept such as space. See, e.g., J. PIAGET & B. INHELDER, THE CHILD'S CONCEPTION OF SPACE (1967).

⁹ The Greek and Hebrew legal civilizations are remembered by us now chiefly for their magnificent use of narrative to explore great normative questions in relation to which the precise technical handling of an issue is of secondary importance. See infra pp. 19-25 (discussion of biblical texts). For one (perhaps idiosyncratic) view of the integration of Greek ideals of law and justice with other great cultural achievements of ancient Hellas, see 1-2 W. JAEGER, PAIDEIA (1939-1943), especially 1 *id*. (1939).

¹⁰ I mean here to suggest a rough correspondence to the Kuhnian understanding of "science" not as a body of propositions about the world nor as a method, but as paradigms integrating method, belief, and propositions — a doing. See T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962); M. POLANYI, PERSONAL KNOWLEDGE (1958).

¹¹ The traditional problems are outlined in W. BISHIN & C. STONE, LAW, LANGUAGE AND ETHICS (1972). Even those who have expanded the concept of hermeneutics have often considered legal hermeneutics to be in large part addressed to a set of operational problems. See, e.g., H. GADAMER, TRUTH AND METHOD (G. Barden & J. Cumming trans. 1975). Gadamer, commenting on a practice I assume he thought characteristic of legal scholarship and dogmatics as practiced in its continental form, wrote: "Legal hermeneutics does not belong in this context [a 'general theory of the understanding and interpretation of texts'], for it is not its purpose to understand given texts, but to be a practical measure to help fill a kind of gap in the system of legal dogmatics." Id. at 289. The entire discussion of legal hermeneutics in Truth and Method is disappointingly provincial in several ways. First, it is entirely statist and therefore does not raise the question of the hermeneutic problems peculiar to all systems of objectified normative texts (statist and nonstatist alike). But it also inadequately addresses the question of the destruction of the hermeneutic in the necessarily apologetic functions of an officialdom. Finally, in Truth and Method, the problem of application is seen as the characteristic difficulty. Thus, even when Gadamer denies the possibility of a straightforward application of general laws to specific facts, he discusses the "problem" of legal hermeneutics as this problem. See, e.g., id. at 471 ("The distance between the universality of the law and the concrete legal situation in a particular case is obviously essentially indissoluble.").

Several of the problems addressed in this Foreword have been suggestively treated by James White, first in J. WHITE, THE LEGAL IMAGINATION (1973), and later in White, Law as Language: Reading Law and Reading Literature, 60 TEX. L. REV. 415 (1982). I am indebted about the incidence of a legal instrument. "Is an airplane or a baby carriage a 'vehicle' within the meaning of the statute prohibiting vehicles in the park?" "Is the statutory requirement of a minimum hourly wage a denial of liberty or property without due process of law?" There is a conventional understanding that a certain consequence follows from the instrument's classifying a thing as "X." There is a dispute about the appropriate criteria for classification.¹² Such problems of official application of legal precepts form one important body of questions about meaning in law. But I want to stress a very different set of issues.

The normative universe is held together by the force of interpretive commitments — some small and private, others immense and public. These commitments — of officials and of others — do determine what law means and what law shall be.¹³ If there existed two legal orders with identical legal precepts and identical, predictable patterns of public force, they would nonetheless differ essentially in meaning if, in one of the orders, the precepts were universally venerated while in the other they were regarded by many as fundamentally unjust.¹⁴

I must stress that what I am describing is *not* the distinction between the "law in action" and the "law in the books." Surely a law may be successfully enforced but actively resented. It is a somber fact of our own world that many citizens believe that, with *Roe v*. *Wade*,¹⁵ the Supreme Court licensed the killing of absolutely innocent human beings. Others believe that the retreat from *Furman v*. *Georgia*¹⁶ has initiated a period of official state murder. Even if the horror and resentment felt by such persons fails to manifest itself in the pattern of court decisions and their enforcement, the meaning of the normative world changes with these events. Both for opponents of abortion and for opponents of capital punishment the principle that "no person shall be deprived of life without due process of law" has assumed an ironic cast. The future of this particular precept is now freighted with that irony no less than with the precedents of *Roe* and *Furman* themselves.

Just as the meaning of law is determined by our interpretive commitments, so also can many of our actions be understood only in

to Professor White for the ways in which he has explored the range of meaning-constituting functions of legal discourse.

¹² See W. BISHIN & C. STONE, supra note 11 (collecting cases and materials).

¹³ On commitment, see *infra* pp. 44–60.

¹⁴ We commonly express and sometimes confuse our sense of this difference through a chronological projection of an ontological distinction. We speak of one legal order as "decadent" or "crumbling" and often think that this quality will *make a difference* — will cause a change over time. This projection onto chronology may entail a serious prediction, of course, but I would suggest that it is as frequently a metaphor (the propositions are so vague that they are never seriously testable) for a deficiency we believe to inhere in a state of affairs.

¹⁵ 410 U.S. 113 (1973).

¹⁶ 408 U.S. 238 (1972).

HARVARD LAW REVIEW

relation to a norm. Legal precepts and principles are not only demands made upon us by society, the people, the sovereign, or God. They are also signs by which each of us communicates with others. There is a difference between sleeping late on Sunday and refusing the sacraments.¹⁷ between having a snack and desecrating the fast of Yom Kippur,¹⁸ between banking a check and refusing to pay your income tax. In each case an act signifies something new and powerful when we understand that the act is in reference to a norm. It is this characteristic of certain lawbreaking that gives rise to special claims for civil disobedients. But the capacity of law to imbue action with significance is not limited to resistance or disobedience. Law is a resource in signification that enables us to submit,¹⁹ rejoice, struggle,²⁰ pervert, mock,²¹ disgrace, humiliate, or dignify.²² The sense that we make of our normative world, then, is not exhausted when we specify the patterns of demands upon us, even with each explicated by Hercules to constitute an internally consistent and justified package. We construct meaning in our normative world by using the irony of jurisdiction,²³ the comedy of manners that is malum prohibitum,²⁴ the

¹⁷ See, e.g., W. STEVENS, Sunday Morning, in THE COLLECTED POEMS OF WALLACE STEVENS, supra note 1, at 66-70.

¹⁸ This point is illustrated in Irving Howe's description of Yiddish radicalism on the Lower East Side:

That the anarchists and some of the social democrats chose to demonstrate their freedom from superstition by holding balls and parades on Yom Kippur night, the most sacred moment of the Jewish year, showed not merely insensitivity but also the extent to which traditional faith dominated those who denied it.

I. HOWE, WORLD OF OUR FATHERS 106 (1976).

¹⁹ On domination and submission, see Hay, *Property, Authority and the Criminal Law*, in D. HAY, P. LINEBAUGH, J. RULE, E. THOMPSON & C. WINSLOW, ALBION'S FATAL TREE 17 (1975).

²⁰ See, e.g., R. KLUGER, SIMPLE JUSTICE (1975).

²¹ The story of Gary Gilmore provides a powerful example of the use of law for mockery. See N. MAILER, THE EXECUTIONER'S SONG (1979).

²² Law's expressive range is profound, and as with other resources of language, the relation of law's manifest content to its meaning is often complicated. Consider the question of using capital punishment to *express* the dignity of human life and its ultimate worth:

This view of the uniqueness and supremacy of human life has yet another consequence. It places life beyond the reach of other values. The idea that life may be measured in terms of money . . . is excluded. Compensation of any kind is ruled out. The guilt of the murderer is infinite because the murdered life is invaluable . . . The effect of this view is, to be sure, paradoxical: because human life is invaluable, to take it entails the death penalty. Yet the paradox must not blind us to the judgment of value that the law sought to embody.

Greenberg, Some Postulates of Biblical Criminal Law, in THE JEWISH EXPRESSION 18, 26 (J. Goldin ed. 1970) (footnote omitted).

²³ See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Marbury is a particularly powerful example of a general phenomenon. Every denial of jurisdiction on the part of a court is an assertion of the power to determine jurisdiction and thus to constitute a norm.

²⁴ With the recognition, already well developed in ancient Greek thought, of the relativity and essentially contingent character of much of the preceptual material in any society, there arises the possibility of making fun of the specific precepts of a society and especially of the HeinOnline -- 97 Harv. L. Rev 8 1983-1984 surreal epistemology of due process.²⁵

A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos — narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves a lexicon of normative action — that may be combined into meaningful patterns culled from the meaningful patterns of the past. The normative meaning that has inhered in the patterns of the past will be found in the history of ordinary legal doctrine at work in mundane affairs; in utopian and messianic yearnings, imaginary shapes given to a less resistant reality; in apologies for power and privilege and in the critiques that may be leveled at the justificatory enterprises of law.

Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative — that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative.²⁶ Thus, one constitutive element of a *nomos* is the phenomenon George Steiner has labeled "alternity": "the 'other than the case', the counterfactual propositions, images, shapes of will and evasion with which we charge our mental being and by means of which we build the changing, largely fictive milieu for our somatic and our social existence."²⁷

But the concept of a *nomos* is not exhausted by its "alternity"; it is neither utopia nor pure vision. A *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures. A *nomos* is a present world constituted by a system of tension between reality and vision.

Our visions hold our reality up to us as unredeemed. By themselves the alternative worlds of our visions — the lion lying down with the lamb, the creditor forgiving debts each seventh year, the state all shriveled and withered away — dictate no particular set of transformations or efforts at transformation. But law gives a vision depth of field, by placing one part of it in the highlight of insistent and immediate demand while casting another part in the shadow of the millenium. Law is that which licenses in blood certain transformations while authorizing others only by unanimous consent. Law is

²⁷ G. STEINER, AFTER BABEL 222 (1975).

HeinOnline -- 97 Harv. L. Rev 9 1983-1984

heavy investment authority structures have in something bearing no necessary (malum in se) relation to the great and potentially tragic clashes of good and evil. When the devil is of our own creation, he becomes comic.

²⁵ See G. GILMORE, THE AGES OF AMERICAN LAW 111 (1977) ("In Hell there will be nothing but law, and due process will be meticulously observed.").

²⁶ See White, supra note 6.

a force, like gravity, through which our worlds exercise an influence upon one another, a force that affects the courses of these worlds through normative space. And law is that which holds our reality apart from our visions and rescues us from the eschatology that is the collision in this material social world of the constructions of our minds.

The codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative. The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative. The various genres of narrative — history, fiction, tragedy, comedy — are alike in their being the account of states of affairs affected by a normative force field. To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be." Narrative so integrates these domains. Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms.

The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior. Any person who lived an entirely idiosyncratic normative life would be quite mad. The part that you or I choose to play may be singular, but the fact that we can locate it in a common "script" renders it "sane" — a warrant that we share a *nomos*.²⁸

²⁸ The warranty of sanity is worth only as much as the social processes that generate it. I perceive a difference, however, between the collective outrages that we sometimes label madness and the idiosyncratic act of an individual.

POWER WITH: PRACTICE MODELS FOR SOCIAL JUSTICE LAWYERING

MICHAEL GRINTHAL*

Public interest lawyers seeking justice for marginalized groups cannot succeed by working alone. Meaningful social change occurs when marginalized and dispersed peoples unite and organize to take power into their own hands. Such groups benefit greatly by forming relationships with lawyers and including them in their organizing processes. However, existing attorney-client models are inadequate to structure such relationships between lawyers and people in the process of organizing. Traditional paradigms of group representation are designed either for fully-formed, established, and hierarchized groups (e.g., corporate representation) or for constituencies who remain atomized and relatively passive throughout representation (e.g., impact litigation and class actions). The inadequacy of existing models hinders public interest lawyers' imaginations and makes it difficult for them to structure efficacious, accountable relationships with the groups with whom they work. This paper addresses that inadequacy by defining and illustrating five concrete models of practice for lawyers representing groups in the process of organizing for power and social change.

INTR	ODU	CTI	ON	
I.	PA	RAI	DIGMS OF LAWYERING WITH AND FOR GROUPS	
	A. 7	Trad	itional Models of Lawyering with Groups	
		1.	Corporate Lawyering	
			Impact Litigation and Class Action	
	B. I	Law	and Organizing as an Alternative to Traditional Paradigms of Group	
		Re	presentation	
		1.	Organizing: A Definition	
			Power	35
			Organizational Development	
			Leadership and Identity Development	
		2.	The Value of Lawyers to Organizing	
			Knowledge & Skills	
			Relationships	
			Access to Legal Forums	
			Values and Traditions	
11.	MO	DE	LS	
	A.		rporate Model	
	B.		gal M*A*S*H Unit	

UNIV. OF PENNSYLVANIA JOURNAL OF LAW AND SOCIAL CHANGE

[Vol. 15

	С.	Lawyer as Political Enabler	50
	D.	Organizing on the Scaffold of Litigation	
	E.	Lawyer as Organizer	58
III.	CHOOSING AMONG MODELS		
	Α.	Model Selection as Recognition of the Constituency	60
	В.	Model Selection as Definition of the Lawyer's Role	61
	С.	Dynamic Relationships Within Models	62
IV.	CO	NCLUSION	64

INTRODUCTION

"[B] ewildered by the shipwreck of the singular, we have chosen the meaning of being numerous."^l

For as long as lawyers have thought to work for social justice, they have aligned themselves with groups such as political parties, civic organizations, charities, government agencies, and churches. After lessons from decades of social struggles, lawyers are turning their attention to the process of organizing itself—by which new and countervailing power groups are built amongst people with little or no power—and are finding roles for themselves as lawyers supporting, protecting, extending, and even initiating the organizing process. Today, "law and organizing" is a robust topic among practitioners and scholars alike, but traditional paradigms of "lawyer," "client," "claim," and even "victory" are inadequate to structure the dynamic relationships necessary to be a lawyer with a group of people in the process of organizing. Traditional paradigms of lawyering with and for groups assume that either the client group is fully organized, incorporated, and hierarchized, as in corporate representation, or completely dispersed and passive, as in class actions or impact litigation. Groups in the midst of social struggle are neither of these two extremes. Rather, through the process of organizing and struggle, they are moving themselves from the latter toward the former. Accordingly, lawyers who support them in their struggles must develop new models of representation appropriate to this difficult dynamic.

The purpose of this paper is to provide concrete models of practice for lawyers who work with marginalized groups in the process of organizing for power. As Corey Shdaimah writes, "[w]hile every mobilization effort is unique, each story can offer a valuable strand to the ongoing discussion."² This paper cannot, and does not try to, set forth a universal theory of law and organizing. Instead, this paper proposes a vocabulary to describe the range of innovative and ever-mutating practices of my colleagues around the world. Those practices have been the subject of increasing scholarly attention recently; the "strands" have, hearteningly, grown

^{*} J.D. 2006, Harvard Law School; M.P.A. 2006, Harvard John F. Kennedy School of Government. Senior Staff Attorney, South Brooklyn Legal Services. I wish to acknowledge the generous support, inspiration, and editing of Professors Marshall Ganz, Lani Guinier, Angela Littwin, and Gerald Torres, and especially Jocelyn Simonson. I also thank the Board of Editors of the University of Pennsylvania Journal of Law and Social Change for their work in preparing this article for publication and for the opportunity to share it with their readers.

GEORGE OPPEN, Of Being Numerous, in NEW COLLECTED POEMS 162, 166 (Michael Davidson ed., 2002).

² Corey S. Shdaimah, Lawyers and the Power of Community: The Story of South Ardmore, 42 J. MARSHALL L. REV. 595, 607 (2009).

numerous.³ At the same time, the practice and theory of law and organizing has become the subject of a growing number of law school courses and academic events.⁴ The discussion of law and organizing is reaching a critical moment, both in practice and in the academy. I hope that this

³ Recent books and articles analyze specific law and organizing practices. See generally Jennifer Gordon, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005); Scbastian Amar & Guy Johnson, Here Comes the Neighborhood: Attorneys, Organizers, and Immigrants Advancing a Collaborative Vision of Justice, 13 N.Y. CITY L. REV. 173 (2009); Monika Batra, Organizing in the South Asian Domestic Worker Community: Pushing the Boundaries of the Law and Organizing Project, in THE NEW URBAN IMMIGRANT WORKFORCE 119 (Saramathi Jayaraman & Immanucl Ness, eds., 2005); Chesa Boudin & Rebecca Scholtz, Strategic Options for Development of a Worker Center, 13 HARV. LATINO L. REV. 91 (2010); Raymond H. Brescia, Line in the Sand: Progressive Lawyering, "Master Communities," and a Battle for Affordable Housing in New York City, 73 ALB. L. REV. 715 (2010); Allison Harper, Building on Traditional Lawyering by Organizing Parent Power: An Emerging Dimension of Early Childhood Advocacy, 14 GEO. J. ON POVERTY L. & POL'Y 339 (2007); Nicholas Hartigan, No One Leaves: Community Mobilization as a Response to the Foreclosure Crisis in Massachusetts, 45 HARV. C.R.-C.L. L. REV. 181 (2010); E. Tammy Kim, Lawyers as Resource Allies in Workers' Struggles for Social Change, 13 N.Y. CITY L. REV. 213 (2009); Zenobia Lai, Andrew Leong, & Chi Chi Wu, The Lessons of the Parcel C Struggle: Reflections on Community Lawyering, 6 ASIAN PAC. AM. L.J. 1 (2000); Orly Lobel, The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics, 120 HARV. L. REV. 937 (2007); Nadia Marin-Molina & Jamie Vargas, The Role of Legal Services in Workers' Organizing, 13 N.Y. CITY L. REV. 195 (2009); Victor Narro, Finding the Synergy Between Law and Organizing: Experience from the Streets of Los Angeles, 35 FORDHAM URB. L.J. 339 (2008); David R. Ricc, The Bus Rider's Union: The Success of the Law and Organizing Model in the Context of an Environmental Justice Struggle, 26 ENVIRONS: ENVTL. L. & POL'Y J. 187 (2002-03); Shdaimah, supra note 2; Paul R. Tremblay, Counseling Community Groups, 17 CLINICAL L. REV. 389 (2010); John N. Tyc & Morgan W. Williams, Networks and Norms: Social Justice Lawyering and Social Capital in Post-Katrina New Orleans, 44 HARV. C.R.-C.L. L. REV. 255 (2009). Some law journals have dedicated issues or symposia to law and organizing. See e.g. Public Interest Practice Section, 13 N.Y. CITY L. REV. 171-232 (2009); Symposium, Organizing and Law in the Obama Era: Commemorating the 100th Anniversary of Saul Alinsky's Birth, 42 J. MARSHALL L. REV. 595-836 (2009); Symposium, Race, Economic Justice, and Community Lawyering in the New Century, 95 CALIF. L. REV. 1821-2146 (2007). See also Loretta Price & Melinda Davis, Seeds of Change: A Bibliographic Introduction to Law and Organizing, 26 N.Y.U. REV. L. & SOC. CHANGE 615 (2000-01) (providing an excellent bibliography of writing on law and organizing published before 2000).

⁴ Courses on law and organizing have recently been taught at numerous prominent law schools. *See, e.g., Community Economic Development*, FORDHAM LAW SCHOOL, http://law.fordham.edu/clinical-legal-education/5420.htm (last visited Sept. 26, 2011) (describing a clinic focused on social justice and sustaining effective organizations); *Immigrant Rights Clinic*, N.Y.U. LAW SCHOOL, http://www.law.nyu.edu/academics/clinics/Year/immigrantrights/index. htm (last visited Sept. 26, 2011) (describing clinic in which students represent immigrants and community organizations); *Immigrant Tenant Advocacy Clinic*, ST. JOHNS UNIVERSITY SCHOOL OF LAW, http://www.stjohns.edu/academics/graduate /law/academics/clinics/immigrant_tenant_advocacy_clinic.stj (last visited Sept. 26, 2011) (describing clinic in which students engage in community organization and represent tenants); *Law and Organizing*, C.U.N.Y. LAW SCHOOL, http://www.law.cuny.edu/clinics/practices/LawandOrganizing.html (last visited Sept. 26, 2011) (describing alternate forms of advocacy, including organization of community-based groups, taught by clinic faculty); *Law, Social Movements and Social Change*, HARVARD LAW SCHOOL, http://comm-org.wisc.edu/syllabi/ganz/LawandSocialMovements syllabus.htm (last visited Sept. 26, 2011) (providing syllabus for class on law and social change); *Lawyering for Social Change: Group Advocacy and Systemic Reform Clinic*, HASTINGS COLLEGE OF LAW, http://w3.uchastings.edu /piomelli_01/Group-Syllabus.htm (last visited Jul. 12, 2007) (providing syllabus for class on lawyering as a social activity working with community groups to bring about change); and Yale Law School (syllabus unavailable).

The Association of American Law Schools also featured a panel discussion on law and organizing in legal education at its 2004 Annual Conference on Clinical Legal Education. Program of Annual Conference on Clinical Legal Education, *Law and Clinics and Law and Organizing*, ASS'N OF AM. LAW SCH., http://www.aals.org/clinical2004/program.html. *See also* Samcer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355 (2008) (offering a typology of clinical approaches and describing an emergent clinical model for public interest law).

paper helps gather the many strands and makes them available to both seasoned practitioners reflecting on their rich field, and to students trying to find their way into a difficult but increasingly central practice.

Discussions with law students about law and organizing, particularly in the context of a course on law and social movements that I was privileged to help teach several years ago with Lani Guinier, Marshall Ganz, and Gerald Torres, formed the original impetus for this paper.⁵ I found students had little difficulty embracing the theories of community lawyering, but they often struggled to imagine just what a lawyer who works with an organizing effort actually does. The students' struggle was a microcosm of the challenge of finding a common vocabulary to describe law and organizing at all levels. At a Harvard symposium dedicated to the practice of law for social change in 2007, seasoned practitioners, activists, and scholars struggled to find common language with which to discuss their experiences. In my own practice as a legal services attorney, my colleagues and I have difficulty articulating the roles we play in neighborhood organizing efforts and imagining the roles we might play but have not yet undertaken. In a discussion group for attorneys to discuss work with community organizations, the agenda includes legal tactics, recent decisions, and campaign news, but we are not talking about the roles we as lawyers are playing in the organizing process-how we are affecting the development of local leadership and power, for good or for ill. Housing lawyers, labor lawyers, civil rights lawyers, for-profit plaintiff-side lawyers—we are all speaking different languages. Though law and organizing as a practice and a field of research has developed rich accounts of experiences and analysis, we lack a common vocabulary through which we can compare and relate our diverse experiences, and by which we can describe the field as a whole to potential funders, judges, institutional partners, students, and the media. This paper attempts to address that struggle by laying the foundation for a concrete vocabulary of law and organizing, setting out five models of legal practice with and in support of community organizing.

This paper also arises from the ten years I have worked as a community organizer and legal services lawyer, and my struggle, shared with many colleagues, to put lawyering at the service of community organizing. These experiences, both rewarding and profoundly unsettling, have left me with the conviction that, in order to be truly effective and sustainable, social justice lawyering must do more than win individual victories. Social justice lawyering must support the development of new leadership and organized power amongst the marginalized, so that the formerly powerless develop the ability to advocate for, claim, and achieve their own victories.

This paper is organized in three parts. Part I introduces the necessity of developing practice models for lawyers to work with groups in the process of organizing. It discusses prevailing models of legal representation of groups and limitations of traditional paradigms (such as corporate representation, which is designed to work with groups that are fully-formed, incorporated, and hierarchized, unlike most marginalized people), and impact litigation and class action, which are designed to work with dispersed and passive constituencies, but do nothing to address that dispersion and powerlessness. In response to the limitations of these traditional paradigms, I next introduce the law and organizing paradigm, in which lawyers work with groups of people who are to some extent marginalized but are in the process of organizing to overcome their marginalization and powerlessness. I argue that this process is the basis for meaningful social change, and that lawyers have valuable resources to contribute to it, if they can figure out how to do so.

Part II addresses the central question of this paper: how, concretely, can and do lawyers

⁵ See Law, Social Movements and Social Change, supra note 4.

work with groups in the process of organizing? Part II answers this question by presenting five models for such relationships: (1) the transactional "Corporate" Model; (2) the "Legal Services as M*A*S*H Unit" Model, in which lawyers provide direct legal services to individual participants in organizing efforts, protecting participants from backlash and retaliation and freeing leaders' energies for leadership; (3) the "Political Enabler" Model, in which lawyers provide litigation, research, and drafting in direct support of the organizing process itself, securing and enhancing the group's right to organize, and helping identify strategies and access points to the political process; (4) the "Organizing on the Scaffolding of Litigation" Model, in which large-scale litigation provides opportunities and structure for nascent organizing initiatives, as well as opportunities for individuals to testify, negotiate, and plan; and (5) the "Lawyer as Organizer" Model, in which the lawyer activates his or her own network of client relationships and attempts to transform them into the basis for an organization. The five models are listed and briefly summarized in chart form in Appendix A. Each of the five models in Part II is illustrated using examples from my own practice, from experiences shared by my colleagues and predecessors, and from rich written histories of social struggles such as the Civil Rights Movement and the Farm Worker Movement. I move between these examples within each model. I also consider the needs, resources, benefits, and risks associated with each of the five models.

Part III analyzes lawyers' choices among these models, both as a response to external conditions and as a framework for transcending those conditions. In this section I again provide narratives from my own and others' experiences to ground my analysis and to illustrate my conceptual framework for organizing our raw experiences.

I. PARADIGMS OF LAWYERING WITH AND FOR GROUPS

Why struggle for a different vocabulary to articulate lawyers' work with groups in the process of organizing? Why not simply use the well-developed rules and terminology of corporate representation, class action, or impact litigation? This Part answers these questions and sets the stage for the practice models that will be illustrated in Part II. I first discuss the importance of public interest lawyers working with groups of marginalized people, rather than with individual clients in isolation. I review the history of lawyers' work with groups: how the traditional paradigms developed to facilitate that work fail when applied to marginalized groups that are not fully "incorporated" and thus may be less able to relate easily to lawyers. I then introduce and define "organizing" as an alternative better suited to social change work. This Part argues for the importance of law and organizing as a practice for exercising and building power. It is my hope that Part I's exploration of these predicate questions will be thought provoking for all readers.

A. Traditional Models of Lawyering with Groups

1. Corporate Lawyering

Far from being a specialized practice, the legal representation of groups is the overwhelming norm in the legal profession today. Established institutions, both public and private, employ lawyers extensively to consolidate their power and advance their agendas. This is not a recent phenomenon. Lawyers have been representing groups at least since Paul Cravath, who developed the modern law firm with its business model and corporate practice over the first

decades of the twentieth century.⁶ A century ago, the rise of the corporation as client presented novel problems. How would lawyers represent large collections of heterogeneous interests? How would they be held accountable to their incorporated clients? Would a lawyer answering to many masters in fact answer to none? For decades, lawyers worked to develop conceptual frameworks for this new practice, to formulate rules grounded in those frameworks, and, most importantly, to institutionalize those rules. On the public side, courts responded to lawyers and legal scholars who argued for a modern corporate jurisprudence developed from simple agency law. The analogization of the corporation to the individual, in addition to granting corporations the rights and protections of citizens, simplified the lawyer-corporation relationship and provided enforceable means of holding lawyers accountable to corporate clients.⁷

By the middle of the twentieth century, lawyers for corporate constituencies had welldefined roles, clear chains of command, and steady work.⁸ Though many cursed (and continue to curse) an ever-enlarging workload and the rise of intricately measured billable time, it is precisely that reliable flow of neatly bounded client need that guarantees them a role, therefore ensuring their survival and measuring their identity. Lawyers respond to both the money and the existential shelter that are Paul Cravath's legacy: many prominent and powerful efforts of the legal profession are dedicated to representing the financial interests of incorporated bodies. A 1982 study of lawyers in Chicago found that the deepest fissure in the profession, the variable more likely even than race to predict lawyers' relationships, home neighborhood, and social milieu, was whether the lawyer predominantly worked with individual clients or with corporate clients.⁹ Sixty-nine percent of 2003 law graduates nationwide who did not go straight into judicial clerkships went to work for law firms or private businesses.¹⁰ Another 12.7% entered government jobs, for a total of 82% working for the most well-organized constituencies in American society.¹¹

In short, lawyering with and for groups is nothing new. Many, if not most, lawyers in the United States today work with incorporated groups. Likewise, lawyers seeking to develop countervailing forces to well-organized establishment institutions also must work with groups. However, the constituencies with whom they must work are often marginalized in the state and private corporate structures for which there are clear, well-defined models of the lawyer-client relationship. Concrete models are needed for structuring relationships between lawyers and unorganized or partially organized constituencies. Many lawyers, organizers, and community leaders have already realized this, and their struggles to innovate, as well as their successes and failures, guide the models developed in this paper.

⁶ See ROBERT T. SWAINE, 2 THE CRAVATH FIRM AND ITS PREDECESSORS, 1819–1948: THE CRAVATH FIRM SINCE 1906, at 10 (1948) (describing the Cravath firm practice as a civil business practice that served corporate and banking clients).

⁷ See, e.g., Ronald Chen & Jon Hanson, The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law, 103 MICH. L. REV. 1, 141–45 (2004) (discussing the treatment of the corporation as an individual).

⁸ David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney–Client Relationship*, 78 FORDHAM L. REV. 2067, 2077–78 (2010).

⁹ JOHN P. HEINZ & EDWARD O. LAUMANN, *The Hemispheres of the Legal Profession: Summary and Speculation, in* CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 127, 127–28 (Northwestern Univ. Press rev. ed. 1994).

¹⁰ AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 44 (Wendy Margolis et al. eds., 2006 ed. 2005).

¹¹ Id.

Social justice lawyers and organizers can and have adapted some lessons from corporate lawyering. For example, the "Corporate Model" in Part II mimics the basic structures of the inhouse counsel to a for-profit corporation. Indeed, corporations were themselves once a novel and insurgent form of organization, and lawyers seeking to develop countervailing power structures today can learn from their success. In reality, though, the possibilities for mimicry are limited: the corporate form may once have been new, but the constituencies that adopted it in the late nineteenth and early twentieth centuries were well-resourced and well-organized, even when their hierarchies were cruder than they are today.¹² Their struggle to institute better legal treatment for their pre-existing enterprises is quite different from the struggle of marginalized groups that have never been legally recognized and may not have any organizational structure. The corporate lawyer is trained to work only with well-organized constituencies. In fact, the shapers of corporate practice also developed the rules of the legal profession so as to emphasize clarity of role and chains of command, viewing as unethical the messy relationships that are necessary when working with inchoate groups.¹³ Whether the pioneers of corporate lawyering were motivated by concern for accountability and authenticity of representation, or by a desire to render disfavored or opposing groups "unrepresentable", has been the subject of analysis elsewhere.¹⁴ Regardless of the purpose for which lawyers shaped corporate representation, the result has been that marginalized constituencies are excluded from Paul Cravath's model of corporate representation. As a result, early public interest lawyers developed their own strategies to make their work relevant to large, marginalized groups: impact litigation and class actions.

2. Impact Litigation and Class Action

Lawyers seeking to advocate on behalf of unorganized constituencies have long turned to the well-developed strategies of impact litigation and class action lawsuits. However, both of these strategies are problematic in their concentration of power in the hands of lawyers. As a result, they have been criticized both for failing to hold those lawyers accountable to the concerned constituencies, and for leaving those constituencies as marginalized as they were prior to the litigation, though perhaps materially better off.

Impact litigation and class action, as strategies of representing unorganized constituencies in single litigations, developed during the early twentieth century, at roughly the same time as the structures of corporate law. But where the institutions, practices, and regulation of corporate representation were designed in large part by the leaders of corporations themselves, the development of impact and class litigation was often guided by lawyers, judges, and legislators with little involvement by members of the constituencies they sought to represent. Corporate representation was originally an alteration of the traditional lawyer's practice of individual representation—the simplification of corporate legal standards into a "shareholder

¹² See MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS 24–26 (1988); see also DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM 149 (1995) (describing the incorporation of trade unions as a means of increasing power in a plural society).

¹³ See generally Kenneth De Ville, New York City Attorneys and Ambulance Chasing in the 1920s, 59 HISTORIAN 291, 298–304 (1997) (discussing limiting the contingency fee and personal injury fee awards of plaintiffs' lawyers).

¹⁴ *Id. See also* Elihu Root, Address of 15 January 1916, *in* N.Y. ST. B. ASS'N PROC. 473–81 (1916) (discussing the need to protect individual liberty in the face of government and majoritarianism).

primacy rule," and a "business judgment rule," under which courts are unwilling to look into the intricacies and opposing forces within corporate decision-making, helped flatten the otherwise heterogeneous corporation into an entity capable of treatment as an individual.¹⁵

While corporate lawyers responded to the unruliness of group representation by subsuming it within the familiar business client relationship-treating the corporation as an individual client writ large—such a strategy was unavailable to early social change lawyers who sought to represent inchoate or marginalized groups. Instead, those lawyers reached back to and adapted a different strand of the nineteenth century lawyer's experience: the "public service" of attorneys who sat on professional and governmental advisory boards, purportedly representing the interests of all sectors of society.¹⁶ Out of this elite public-mindedness came the notion that lawyers, either by training, logic, proximity to justice, or sheer civility, could zealously represent the interests of constituencies to whom no legal mechanisms held them accountable. Thus, for some historians, impact litigation has always been a form of paternalism, even *noblesse oblige*.¹⁷ A competing history of impact litigation suggests that the first impact litigators were in fact grounded in organized constituencies-such as the National Association for the Advancement of Colored People and the labor movement-that could indeed hold them closely accountable by intricate social and organizational mechanisms.¹⁸ According to this history, impact litigators became detached from their bases only later, during a general professionalization of political advocacy in the 1960s and 1970s.¹⁹ But both versions of the rise of impact litigation leave us with the same problems of accountability and power.

The representation of marginalized constituencies by lawyers who are not themselves marginalized, though they may be members of the constituency, makes clear this problem of accountability. This is especially true when, as is usually the case, there are insufficient structures

¹⁷ See DE TOCQUEVILLE, supra note 16, at 276 (arguing that lawyers in the United States and England both have an aristocratic character and serve the popular cause, and act as a connecting link between the two).

¹⁸ See Randall Kennedy, Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott, 98 YALE L. J. 999 (1989) (describing the role of litigation within the Montgomery Bus Boycott and the Civil Rights Movement); Kenneth W. Mack, Rethinking Civil Rights Lawyering and Politics in the Era Before Brown, 115 YALE L. J. 256 (2005) (highlighting the achievements of NAACP lawyers leading up to the Supreme Court's decision in Brown v. Board of Education); see also ERNST, supra note 12 (discussing the role of lawyers working with and against organized labor).

¹⁵ See Chen & Hanson, *supra* note 7 at 42–46 (arguing that Milton Friedman's case for sharcholder primacy was a turning point in corporate legal theory and that the basic script of shareholder primacy is still a relevant doctrine). For a statement of the business judgment rule, see, for example, *MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127–28 (Del. 2003).

¹⁶ See, e.g., ALEXIS DE TOCQUEVILLE, The Temper of the Legal Profession in the United States, and How It Serves as a Counterpoise to Democracy, in 1 DEMOCRACY IN AMERICA 272, 273 (Vintage Books ed., 1990) (describing lawyers as an elite class in society, superior in intellect and judgment); Clyde Spillenger, *Elusive Advocate: Reconsidering* Brandeis as People's Lawyer, 105 YALE L. J. 1445 (1996) (describing Brandeis as a harmonizer of conflicting social interests who pursued activities in the public interest without the constraints of the attorney-client relationship).

¹⁹ For discussions of the professionalization of political advocacy, see ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 151 (2000); J. Craig Jenkins, *Nonprofit Organizations and Political Advocacy, in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 317 (Walter W. Powell & Richard Steinberg, eds. 2006); Robert Cameron Mitchell et al., *Twenty Years of Environmental Mobilization: Trends Among National Environmental Organizations, in* AMERICAN ENVIRONMENTALIST: THE U.S. ENVIRONMENTAL MOVEMENT, 1970 – 1990, at 21–24 (Riley E. Dunlap & Angela G. Mertig eds., 1992) and Robert K. Vischer, *The Good, the Bad, and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 988–89 (2004).

by which the constituencies can determine their group values and enforce them upon the lawyer. Such anxiety is manifest in the recent trend towards limitations on the class certification and the awarding of legal fees.²⁰ Public officials who remain unmoved by the lack of voting power of poor people, immigrants, and people of color in their own districts become suddenly stricken at the thought that these same people might be caught up in nonconsensual "virtual representation" by a nonprofit or plaintiff-side lawyer.²¹ As a result, there is no shortage of attention to the accountability problem in impact litigation and class action.

But it is not primarily due to the lack of accountability that lawyers increasingly turn away from impact litigation and class action. As I will discuss below, accountability can similarly fail when lawyers work with well-organized constituencies²² (indeed, even with the strict lines of accountability in corporate lawyering, most employees of a corporation are prohibited from holding the corporation's lawyers accountable to their interests-clarity does not equal authenticity). Certainly, lawyers engaged in traditional impact litigation are no less accountable to marginalized constituencies than are any other elites (and battles over tort reform and the restraints on class action lawyers are primarily political struggles between liberal and Rather, public interest lawyers' growing dissatisfaction with impact conservative elites). litigation is dissatisfaction with its *limits*, specifically its failure to change the unorganized status of its beneficiaries: it leaves behind no new relationships, operating institutions, or increased ability for marginalized people, and their lawyers, to act effectively together. Indeed, that is why corporations do not rely on impact litigation to advance their core missions. An automaker that, instead of manufacturing and marketing cars, simply sued the federal government for the realization of the right to "a car in every garage," would never begin to exist as a sustainable, profitable operation-even if, by legal genius and favorable judicial climate, the suit were successful (or perhaps *especially* if the suit were successful). A marginalized constituency that wins a benefit through litigation at a distance is simply a marginalized constituency with a benefit. I am troubled less by ethical concerns about the power of unaccountable lawyers than by the powerlessness of marginalized constituencies that are forever reliant on lawyers' assistance.

B. Law and Organizing as an Alternative to Traditional Paradigms of Group Representation

As discussed above, lawyers working for social change cannot work with the fully incorporated, hierarchized, and established groups of Paul Cravath's corporate representation model. Nor should they limit their work to the atomized, dispersed and passive constituencies of the impact litigation and class action models. Instead, lawyers who seek to build countervailing power must work with people who are *in the process* of transforming themselves from atomized and dispersed to organized and powerful. None of the traditional paradigms of group representation are sufficient to structure lawyers' relationships with constituencies in the process

 $^{^{20}}$ See, e.g., General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 155–60 (1982) (emphasizing the importance of carefully evaluating a plaintiff's claim that he or she is a proper class representative under Federal Rules of Civil Procedure 23(a)).

²¹ See, e.g., Bob Dole, Opinion, Ignore the Lawyers, Help the People: The Powerful Trial Lawyers Lobby Must Not Be Allowed to Stymie Tort Reform, L.A. TIMES, Apr. 27, 1995, at B7 (arguing that trial lawyers fail to protect consumers and the public); see also Timothy Wilton, The Class Action in Social Reform Litigation: In Whose Interest? 63 B.U. L. REV. 597 (1983) (arguing that contrary to popular belief, the class action device is more beneficial to defendants than plaintiffs).

²² See infra pp. 19–22 (outlining the challenges lawyers face in community organizing).

[Vol. 15

1. Organizing: A Definition

Before it is possible to discuss the practice of law and organizing, it is first necessary to introduce the practice of organizing itself. Organizing is a vast and deep field, the whole of which cannot be done justice in this paper.²⁴ What I will provide here is only a working definition and some basic criteria essential to the practice.

For the purposes of this paper, I define organizing as the processes by which people build and exercise power by collecting and activating relationships. These processes may come under the rubrics of community organizing, the labor movement, political campaigns and movements, organization of counter-institutions, etc. I am speaking specifically of the combination of people as the primary source of power, not simply any instance in which a few people collaborate to focus their pre-existing power (such as when several lawyers work together on a case). By "organizing," I mean those processes by which power is created from multiplied relationships—a phenomenon of energy release that civil rights organizer Bob Moses likened to nuclear fusion.²⁵

This definition of organizing is grounded in my own experience working as a community organizer before beginning practice as a lawyer. Over the course of six years, 1 worked for several different organizing projects, including the Association of Community Organizations for Reform Now (ACORN) in Houston,²⁶ Hartford Areas Rally Together (HART),²⁷ and the Essex

For examples of contemporary organizations that practice community organizing, see CENTER FOR THIRD WORLD ORGANIZING, http://www.etwo.org/index.php?s=23, (last visited Sept. 26, 2011) (striving to achieve social and economic justice through direct action and grassroots strategies); THE INDUSTRIAL AREAS FOUNDATION, http://www.industrialareasfoundation.org/who.html (last visited Sept. 26, 2011) (building power and working for social change through institution based organizing); KENTUCKIANS FOR THE COMMONWEALTH, http://www.kftc.org/about-kftc (last visited Sept. 26, 2011) (organizing for just economic policies in Kentucky); MAKE THE ROAD NEW YORK, http://maketheroadny.org/whatwedo.php) (last visited Sept. 26, 2011) (using community and electoral organizing in conjunction with legal and support services, to promote economic justice in New York); and THE CENTER FOR COMMUNITY CHANGE, http://www.communitychange.org/page/about (last visited Sept. 26, 2011) (supporting and mobilizing grassroots groups).

²⁵ See PAYNE, supra note 24, at 367.

²⁶ While ACORN chapters have recently dropped the name ACORN and rebranded following negative publicity campaigns against them, I continue to use the name ACORN here because there is otherwise no organizational name that covers the shared history, strategies, tactics, and structures of all of these chapters. "ACORN" remains an organizing model, if no longer a corporate entity. For ACORN's history, structure, and methods, see JOHN ATLAS, SEEDS

²³ See supra notes 3–4.

²⁴ There are many excellent resources on the history, theory, and practice of organizing. *See, e.g.*, EDWARD T. CHAMBERS, ROOTS FOR RADICALS (2004); CHARLES PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE (1995) (analyzing the legacy of community organizing in Mississispipi); RINKU SEN & KIM KLEIN, STIR IT UP: LESSONS IN COMMUNITY ORGANIZING AND ADVOCACY (2003); GABRIELLE THOMPSON, CALLING ALL RADICALS: HOW GRASSROOTS ORGANIZERS CAN SAVE OUR DEMOCRACY (2007); Dave Beckwith & Cristina Lopez, Community Organizing: People Power from the Grassroots (1997) (unpublished article), *available at* http://comm-org.wisc.edu/papers97/beckwith.htm (defining action strategies for community organizing); Marshall Ganz, Organizing: People, Power and Change – Organizing Notes 1 (2006) (unpublished syllabus), *available at* http://www.hks.harvard.edu/fs/mganz/teaching.htm (defining organizing and explaining the general strategies of an organizer).

County Community Organization (ECCO) in Lynn, Massachusetts.²⁸ As an organizer, it was my job to help the residents of city neighborhoods—usually struggling neighborhoods—form organizations through which they could have the power to influence public decisions. These residents are often excluded from participating in important decisions concerning allocation of resources in their communities. For example, what kind of jobs should the city seek to generate with its employer tax breaks? What kind of housing should be built? Which schools should get more funding, and what should the money be spent on? What should be the priorities of the police? Of public works? Where should incinerators be built? And where should libraries be built? Organizing begins with these issues, and builds power towards participation in the larger systems and frameworks that shape distribution of resources nationally and globally.

The first community groups I organized flared up, won concessions of community policing or street sweeping, and burned out. One neighborhood group in the South End of Hartford could not even celebrate the City Council's adoption of its demanded \$1 million War Against Rats, because the exhausted residents had grown too weary of each other and of me to gather together in one room. No one stayed for the planned evaluation following the Council meeting. They went home instead to wait among the rats for the city exterminators to come around. The article in the newspaper about the drastic shift in city policy made no mention of the neighbors who had driven it, and there was no one who could call to seek a correction. Driving home alone, I swerved too late to avoid hitting an apparently malformed kitten running from behind an open dumpster. A closer inspection made clear the mistake of seeing, and I sat on the curb shaking and wondering how it was possible to win so big and at the same time lose so badly as to be left alone with only a fat, dead rat to share the evaluation.

And so it is not only strategic analysis, but also what a colleague later pointed out was simple loneliness that grounds the criteria by which organizing efforts are evaluated. What was the nature of this organizing failure? To be successful—to truly be *organizing*—an organizing effort must meet three criteria, or core values: (1) it must build the power of the group that is organizing, changing the group's relationships to other, already powerful institutions and groups; (2) it must result in sustainable organizational structures that can be applied to future struggles; and (3) it must result in the development of individual participants' capacities to lead and advocate on their own behalf. These criteria are presented below. Upon setting them out, I realize that, like the rings of a tree, they emerge in reverse nested order: I begin with what is most external and most visible in a successful organizing effort, and come through that to what lies within and produces it.

Power

Organizing, as this paper is concerned with it, is aimed at creating power. The simplest definition of power comes from its Latin root: "to be able." To have power is to be able to

OF CHANGE (2010) (narrating the story of ACORN); ROBERT FISHER, cd., THE PEOPLE SHALL RULE: ACORN, COMMUNITY ORGANIZING, AND THE STRUGGLE FOR ECONOMIC JUSTICE (2009) (assessing the current state of community organizing and the effectiveness of ACORN).

²⁷ HARTFORD AREAS RALLY TOGETHER, http://www.hartofhartford.org/ (last visited Sept. 26, 2011).

²⁸ At the time I worked there (Jan. 2000 through June 2002), ECCO was an affiliate of the Industrial Areas Foundation (IAF), http://www.industrialareasfoundation.org/ (last visited Sept. 26, 2011). It is now an affiliate of People Impacting Communities through Organizing (PICO), http://www.piconetwork.org/act/find (last visited Nov. 14, 2011).

accomplish one's goals.²⁹ If you cannot accomplish your goals, then you do not have (enough) power. If someone else can accomplish your goals on your behalf, then you do not have power. We each have in our bodies the power to move stones, but if we can coordinate our bodies with other bodies, we have the power to build cities. This, crudely, is why power comes from organizing people. In a civilized society, power may mean the ability to move the levers that control already-existing organizations of people and resources (e.g., to persuade a city council to instruct city officers to order a landlord to clean up his property), or it may mean creating entirely new levers.

There may be more than one way to create power, but for the purposes of this paper, "organizing" means organizing people, developing what Bernard Loomer has called "relational power."³⁰ Relational power is the power that comes when people combine and coordinate their thoughts, voices, energy, imagination, and other resources.³¹ Importantly, relational power is not a zero-sum quantity.³² If an unorganized constituency becomes organized, this does not necessarily reduce the power of other parties or constituencies (though of course any political player may sometimes enter into zero-sum struggles, such as disputes over the uses of limited funding). The constituency does not have to choose between the power developed through its own organized relationships and the power offered by the lawyer's access to legal forums. As I will further explore below, the lawyer-client relationship is only another relationship through which power can develop. It is a kind of relational power, not an alternative to it.

Organizational Development

But momentary power is not powerful at all if other parties and other constituencies will continue to exercise power every day into the future. The games that marginalized constituencies have always lost are iterated games—winning today only means that you have something to lose tomorrow. As was painfully clear to me that night in Hartford, organizing is not something that happens once—a founding or a meeting—but a constant process of sustaining *organization*. There is no model of organization that is inherently sustainable. Organization is only sustainable as long as deliberate organizing continues. At times, when an organization becomes embroiled in a particular struggle, organizing (the building of new relationships) gives way to negotiation, protest, research, and other tactics of political victory. Paradoxically, it is as the organization approaches and becomes caught up in victory that it is in the greatest danger. And it is at this point—amidst argument and maneuvering—that lawyers often feel most competent.

The power of organized people is sustained into the future by replicated patterns of relationship and action—*organization*. An organization is a structure in which individuals develop as leaders, relate to others, and exercise their power. More importantly, it is the continuation of relational power beyond the horizon of any single issue or the tenure of any particular individual.³³ The difference between a temporary mobilization and a sustainable

³² CHAMBERS, *supra* note 24, at 28.

²⁹ CHAMBERS, *supra* note 24, at 27–31.

³⁰ Bernard Loomer, *Two Conceptions of Power*, 6 PROCESS STUDIES, No. 1, Spring 1976, at 5–32, *available at* http://www.religion-online.org/showarticle.asp?title=2359.

³¹ See Ganz, supra note 24, at 16 (defining relational power and explaining its formation based on joint interest in shared resources). See also Loomer, supra note 30.

³³ See, e.g., Ganz, supra note 24, at 89–101 (describing the tensions and dilemmas inherent in organizational structures, offering advice on how to effectively manage these tensions and dilemmas, and advocating for shared

organization can be elusive, but typically organization is marked by creation of structures, shared identity, and rituals by which these are transmitted beyond the original group of leaders. Organization is performative—it continues to exist as long as people *act it out*. Structures are patterns of action and depend for their lives on continued action.³⁴ There are forms of reified structure—the organizational chart, the calendar, the building—that, while often present in vibrant organizations, should not be confused with genuine organizational structure itself. The monthly meeting is only a true organizational structure as long as the participants continue to *meet* one another.³⁵

Structure—though often conceptualized spatially—is the way organizations exist across time. The Israelites wandering in the Sinai desert first established the rudiments of a calendar of festivals and observances that continued to organize their descendants for thousands of years, even though Israel as a spatially organized territory has existed only for a relatively brief portion of Jewish history.³⁶ Patterns of behavior can be indestructible and sustaining.

Leadership and Identity Development

Beyond structure, the essence of organization is the rise of individuals to act on one another—leadership. Leadership for the purposes of organizing is simply the power to move people.³⁷ Organizations with no leadership do not move. If they do not move, they are no longer organizations (though they will likely continue to be mistaken as such for a long time), because they are no longer patterns of action. Leadership without organization is simply mobilization, and not sustainable; because it does not replicate itself, the movement stops when the individual does.

An organization led by professional organizers has built power not for the powerless, but for the professionals. A struggle won by lawyers accrues spoils to lawyers. Millions of poor people work for corporations, but corporations are not poor peoples' organizations as long as poor people are the ones whose bodies are moved by the corporations, and not vice versa.

Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves.³⁸

Thus, an organizing effort must involve the development of leadership from and within the group that is organizing.

Leadership requires skills that can be developed through experience. ³⁹ "Leadership

responsibility within an organization).

 $^{^{34}}$ CHAMBERS, *supra* note 24, at 80 (quoting Saul Alinsky as saying "[a]ction is to the organization as oxygen is to the body.").

³⁵ See MICHAEL GECAN, GOING PUBLIC 131 (2002) (arguing that organizations often squander the time and energy of their participants).

³⁶ ABRAHAM JOSHUA HESCHEL, THE SABBATH: ITS MEANING FOR MODERN MAN 2-12 (Noonday Press ed. 1989) (discussing Judaism as a "religion of time" that sanctifies and creates an architecture of time).

³⁷ See Ganz, supra note 24, at 28-41 (outlining strategies of effective organizational leadership development).

³⁸ Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970).

³⁹ See Lindsey P. Walker-Estrada, The Education and Liberation of the Poor in Community Organizing

development" means both the development of leaders (the introduction of people to new relationships), and the development of leadership (the development of skills, knowledge, habits, and experience).⁴⁰ Practically speaking, this makes up the bulk of time spent by any group of people who are organizing. It was not what I had spent my time doing in Hartford; rarely in the course of that campaign had I helped any of the residents act as more than aggrieved neighbors who were moved by events, and so when they won their victory they returned to passively await the services to which they were entitled. None of them had acquired the habit of thinking about the group or the skills to gather their neighbors in exhaustion. More deeply, none of them owned the group. Because I had been the one to push and pull them to City Hall, it was not their organization to worry about.

I wrote above that each of these criteria—power, organizational development, and leadership and identity development—depends for its existence on the one below it, so that leadership development enables organization formation. This provides for sustained action, which is the way to build power in the iterated game of politics. But in fact, organizing is cyclical—having power is not only the end result of organizing but also a transformative experience through which individuals become leaders, starting the cycle anew.

Take, for example, the story of Mr. Domingo, a 40-year-old Guatemalan immigrant living in Lynn, Massachusetts. In the ten years since his arrival, he had worked a series of deadend minimum wage jobs. He was surviving, but he had no savings to buy a car, pay for a house, or support a family. His pastor asked him to tell his story at a mass community meeting organized by the Essex County Community Organization. He agreed, but only reluctantly, because, as he later admitted, he considered himself a failure. The night of the meeting, he spoke third on a program of five speakers. He spoke of working full time for ten years, showing up on time, never taking sick days, getting the job done, but never getting anywhere, never keeping a job for more than a year, and never saving enough to buy a car or make a down payment on a home. At the end of ten years, he said, he was embarrassed and ashamed to find that he had gotten nowhere. The two speakers before him told similar stories of hard work, patience, and little to show for it. The speaker after him, a more experienced leader in the organization, spoke about city economic development policies. He described how the city offered job-creation tax incentives to employers without guidelines as to the nature of the jobs or any oversight to monitor whether those employers were creating any jobs at all-leading to the temporary, minimum wage job market in which Mr. Domingo was trapped. The last speaker asked the assembled members of the Lynn City Council to change the tax program to provide incentives for employers to provide jobs with career ladders and decent wages. In the audience were three hundred parents and workers, making up the largest group to gather for any political event in the city's municipal campaigns that year. Pushed by the organized numbers, the Council Members agreed to ECCO's changes.⁴¹ Later that night, at the organizational evaluation, Mr. Domingo thanked the other leaders present for helping him "to tell my story for the first time in a way so that I wasn't ashamed of it, to see that I am not a failure, but that I have been held back."42 Leadership helps

^{(2003) (}unpublished paper), available at http://comm-org.wisc.edu/papers2004/walker.htm (discussing research on personal transformation that takes place in the process of organizing).

⁴⁰ See Ganz, supra note 24, at 28-41 (outlining strategies of effective organizational leadership development).

⁴¹ Kathy Ehrich, *Residents Demand Affordable Housing*, LYNN DAILY ITEM, May 15, 2001.

⁴² Larry McNeil, an organizer for the Industrial Areas Foundation, tells a similar story about the collapse of his father's business. Larry McNeil, Congregations for the New Millenium 4 (unpublished manuscript) (on file with

build power, but the all too rare experience of power in turn transforms people into leaders.

This section began with two questions: "what is organizing?" and "why organizing?" I will let Mr. Domingo's words stand as the final answer to both.

2. The Value of Lawyers to Organizing

Given the power that can be unleashed through organizing, why are lawyers necessary to the process at all? As I discuss below, the involvement of lawyers in organizing does pose some well-documented risks. But lawyers provide resources in the form of knowledge, skills, relationships, access to legal forums, and, perhaps surprisingly, values and traditions, all of which can be valuable to groups in the process of organizing.

Organizers and community leaders traditionally distrust lawyers as threats to the complex, sometimes fragile process of organizing and individual leadership development.⁴³ Lawyers, they worry, stifle the development of leaders by taking people's struggles away from them, diverting them into the restricted fixing grounds of the courts. A plaintiff in traditional impact litigation or legal services makes few decisions, rarely or never speaks on her own behalf, and engages in little or no work requiring her to practice new skills or strengthen old ones.

Forty years ago, criticism of top-down impact litigation as a social change strategy was insurgent. Today, while impact litigation continues to command prestige and attention, the domineering "hero lawyer" with hands of lead is increasingly a straw man. In my experience, attorneys at the ACLU and the Legal Defense Fund strain to build and sustain coalitions; legal services lawyers prize opportunities to work with community organizations. But increased selfawareness and changing ideals of practice have not brought lawyering into harmony with organizing, in large part because the dissonances between the two practices were never simply a result of disrespect or ignorance. The dissonances were, and remain, structural. Where organizing requires networks of relationships, the fundamental particle of legal action is individual relationships shielded by confidentiality.⁴⁴ Even in class action or impact litigation, the lawyer typically mediates all relationships in the group-plaintiffs relate to the lawyer, never directly to one another. It is difficult to develop a shared identity if the articulation of group interests and group story is entirely in the hands of the lawyer. Further, if victory means legal victory, then that story must be crafted to suit the exigencies of the legal argument. In a legal system that understands action exclusively as redress of injury, the common story told by a legal argument must be one of weakness and incompleteness, and the aggregation of plaintiffs' stories an amplification of weakness. In contrast to Mr. Domingo's experience, class members find only echoes of their own lack in their co-plaintiffs, never answers to their common problems.

Even lawyers committed to "rebelling" (to use Gerald Lopez's term,⁴⁵ now itself a seasoned rallying cry for lawyers critical of dominant practice) find it difficult to avoid these negative effects, as their clients often participate vigorously in disempowering themselves and

author).

⁴³ See, e.g., William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U.L. REV. 455 (1994) (arguing that lawyers do not understand community development, and consequently their organizing efforts often leave communities worse off).

⁴⁴ See MODEL RULES PROF'L CONDUCT 1.6 (1983).

⁴⁵ GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VIEW OF PROGRESSIVE LAW PRACTICE *passim* (1992).

empowering the lawyer. The specialized knowledge purportedly possessed by lawyers has been so mystified that clients habitually defer to the lawyer's judgment.⁴⁶ Meanwhile, the legal institutions to which the lawyer must answer demand the speedy, specialized responses that militate towards a unitary responder; there is little room for group deliberation or multiple voices in the courtroom. If clients are less well-organized or powerful than the court as an institution (and if they are not, why would they seek the court's ruling?), then the lawyer, and thus the strategy and goals of the litigation, will be pulled more by the court than by the clients. Even before a lawyer sets foot in court, the clients' values and goals must become causes of action—a sometimes violent process. And, of course, any legal claim must recognize and exalt the power of the court and the legitimacy of the existing law (or that law which can be handily extrapolated from it).

Not only the structure of legal process, but its strategies can also do violence to relationships and leadership. Lawyers advise clients to freeze all activity related to the issue, such as public speaking, negotiation, transaction, so as to better preserve it for legal argument. This is not merely a bad habit; it is in fact often part of *good strategy* for winning in court. A public statement by a litigant may waive a privilege, undermine or contradict testimony, or make the other side's case for them, as when a Brooklyn landlord sued for failure to make repairs bragged to a reporter that he intended to "let [the tenants] suffer."⁴⁷ It is not the insensitive lawyer, but the dynamics of litigation itself that insist that the lawyer-client relationship be maintained to the exclusion of all other relational power.

Still, it is no surprise that many critics continue to accuse lawyers of "de-radicalizing" their clients' demands. William Simon notes that lawyers begin to reconstruct clients' interests even as they "innocently" seek to find out what those interests are.⁴⁸ Indeed, it could not be otherwise; as Loomer defines it, relational power is always "the capacity both to influence others and to be influenced by others."⁴⁹ The presence of the lawyer will *always* alter the client's subjectivity; the failure of the traditional legal services model is not that it is unable to negate this effect, but that it does not acknowledge and take responsibility for it. If organizing is about developing "power with," then litigation seems to be about aggrandizing "power over" in exchange for its momentarily favorable exercise.⁵⁰

There is truth to these criticisms. As Bill Quigley quoted one veteran organizer, "In my 25 years of experience, I find that lawyers create dependency. The lawyers want to advocate for others and do not understand the goal of giving a people a sense of their own power."⁵¹ But there is also overreaction. The radical critique of lawyering at times approaches superstition, as if lawyers were black holes, inexorably warping any organizational space into which they enter. In fact, some alarmist narratives so perpetuate the mystification of lawyers as to contribute to the

⁵⁰ Id.

⁴⁶ William H. Simon, Lawyer Advice and Client Autonomy: Mrs. Jones's Case, 50 MD. L. REV. 213 (1991); Lucie White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 BUFFALO L. REV. 1 (1990).

⁴⁷ Helen Klein, *Tenants Stage Protest Outside Landlord's Home*, N.Y. POST, Mar. 8, 2010, http://www.nypost.com/f/print/news/local/%E2%80%A6/tenants_stage_protest_outside_landlord_6YJjsBL5hlqt5DgAwW NchP.

⁴⁸ William H. Simon, Visions of Practice in Legal Thought, 36 STAN. L. REV. 469, 475–76 (1984) [hereinafter Simon, Visions of Practice].

⁴⁹ Loomer, *supra* note 30.

⁵¹ Quigley, *supra* note 43, at 458 (quoting interview with Ron Chisom).

effects they decry; when lawyers do arrive on the scene—perhaps representing opponents, perhaps opportunity—organizers and leaders are conditioned to overreact, automatically mistrust, and shun relationship where a relationship might be politically appropriate.

Surrender to the destructive dynamics of lawyering is not inevitable. Neither is transformation of the lawyer's role and impact a simple matter of renunciation, no matter how emphatic. It is, like all transformations, a long and daily struggle. And, like all powerful struggles, it must be relational. It will take lawyers and non-lawyers working together to reimagine and re-mold the lawyer-client relationship. To assume that lawyers can do so unilaterally is to begin with the very assumption sought to be transcended—that all power flows from and all responsibility accrues to the lawyer.

Why, with all of the narrative danger swirling around them, should we even bother with lawyers? If it is true that "poverty will not be stopped by people who are not poor,"⁵² why not concentrate on organizing the poor and leave lawyers out of it? The answer, of course, is that once we clear away the mystification, lawyers, like any other participant in organization, have both value and values that can be amplified when they come into relationship with other people. As discussed below, lawyers bring specific knowledge and skills, relationships with powerful institutions, access to legal forums, and traditions of individual worth and equality. This list is by no means an exhaustive picture of what lawyering may be or has been. My purpose in offering it here is to prepare a framework for evaluation of the lawyer-constituency relational models in the following section, so that it will be possible to ask of each model: "what aspects of lawyering are engaged in this relationship? To what extent is the lawyer entering into the relationship *as a lawyer*?"

Knowledge & Skills

Lawyers famously possess unique knowledge and skills uniquely adapted to the public arena. Just as Mr. Domingo's storytelling abilities took on new value when he used them in relation with the other leaders with whom he shared the stage, so the value of lawyers' special knowledge and skills multiplies in the context of group action. Sometimes the lawyer may simply do what she knows best how to do. At other times, the lawyer may replicate her knowledge and skills by teaching others. These knowledge and skills can be important tools, as long as the lawyer and the constituents do not confuse them for strategies in and of themselves, or allow group goals to be shaped by their easy availability.

Relationships

As discussed above, organizing, at its core, consists of the building and mobilization of deliberate relationships. Lawyers, like pastors, shop stewards, teachers, block captains, grandparents, etc., tend to have relationships with many people. In a poor community, the local legal services lawyer may be the only relationship that numerous tenants, benefit recipients, or laid-off workers have in common. The lawyer is the first to see changes in the local community or economy in the pattern of clients coming through the door. In addition, because lawyers so often mediate between their clients and powerful institutions, they know the local decision-makers and resource controllers.⁵³ Experienced lawyers walk around with robust power maps in their heads,

⁵² Wexler, *supra* note 38.

⁵³ Ross Dolloff, Community Leadership as Advocacy – A Different Advocacy Model for Legal Services

developed through repeated interactions with institutions; they know the *real* procedures by which agencies make decisions—who is influential, what their values and interests are, who is coming up, and who is on their way out—in addition to the official written procedures that community leaders can discover through diligent research.

Once it may have been the parish priest who played these roles. And it may bode poorly for our society if they have shifted to the lawyer. But the answer, rather than delivering eulogies for civil society, must be to draw lawyers out into networks of relationship and interdependency, to enable them to share their hoard of social capital—a hoard many do not want to keep to themselves, but simply do not know how to redistribute. The lawyer, like the priest, is often the loneliest person that knows everybody, and this ought to have any decent organizer salivating.

Access to Legal Forums

The lawyer's privileged access to courtrooms and other institutional forums is a scarce resource that they alone can make available to organizing efforts. Most people do not have to be told how valuable this resource can be; even organizers who scorn litigation cannot entirely avoid criminal charges, collateral civil attacks, and the transactional requirements of group development. More fundamentally, all organizing efforts at some point seek recognition,⁵⁴ and recognition is often formal, whether legal (as when a union is recognized by the National Labor Relations Board) or private but rule-bound (as when a corporation allows a proxy organization onto the agenda of its shareholders' meeting). Formal recognition is often an important step in exercising power (though it is unfortunately almost as often confused with power itself), and lawyers are given privileged access to its processes. Under current law, at least, lawyers cannot simply give this access away to nonmembers of the bar. The only way they can redistribute their privilege is to enter into relationships through which their access is mobilized and held accountable by a group decision-making process.

Values and Traditions

Perhaps it is surprising to find "values" under a reckoning of what lawyers have to offer people struggling for change, but the legal profession has been the site of a unique valorization of the worth and equality of individuals that can be a powerful counterpoint to organizers' necessary focus on collective action and identity.

Beyond easy stereotyping of lawyers, both practitioners and theorists of relational power have specific and thoughtful critiques of the "rights talk" that arises when lawyers talk values.⁵⁵ Too often, "rights" in litigation are synonymous with grievances, so that those who claim them (or on whose behalf lawyers claim them) are defined by their weakness and need for state intervention. Moreover, as courts have increasingly rejected doctrines of group rights in favor of personal injury models of redress,⁵⁶ to talk in terms of rights is to atomize individuals.

Providers, MGMT INFO. EXCHANGE J., Spring 1999, at 10, 10-12.

⁵⁴ Recognition should not be confused with approval, friendship, or sanction. Recognition is merely the acceptance of the organization as representative of its constituency, and as a legitimate actor in the public arena.

⁵⁵ See, e.g., MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE passim (1991) (critiquing the use of rights-based language as the main way the American public discuses right and wrong).

⁵⁶ George A. Rutherglen & John J. Donohue III, Employment Discrimination: Law and Theory 561 (2005).

While there is a great deal of cautionary truth to this critique, critics of rights have overlooked another, older understanding of legal rights, one that has informed struggles for dignity and recognition throughout American history. Long before the Supreme Court narrowed legal discrimination claims to individual demands for money damages, Blacks standing at the doors of southern registrars' offices demanded the right to vote as a birthright of "first-class citizenship"—a rite of recognition and inclusion in public life.⁵⁷ Jennifer Gordon has described the transformative effect on immigrant workers of the realization that the legal rights to safe working conditions and fair wages applied to them as well as to Anglo-Americans:

For immigrants, it is the jolt of a change in how others see you: If I have rights then the government recognizes me as being here after all. If I have rights then I exist here in a way I did not when I thought I had no rights. More profoundly still, it is a change in how you perceive yourself. Being seen as a person with rights opens the possibility of seeing yourself differently, and then of acting differently – of acting like the sort of person who has rights.⁵⁸

For much the same reason, labor unions across the country push for local governments to pass "right to organize" resolutions; these resolutions are purely expressive (they grant no rights not already included in federal labor law).⁵⁹ Why does the labor movement—perhaps the greatest repository in American political culture for the lesson that power rather than words makes change—choose to devote so much energy to a mass movement of announcing rights? Because the legal right to organize is a recognition of their existence. More importantly, by codifying this right into municipal law, local governments make a real commitment of solidarity with local unions. Rights are collective commitments.

Thoughtful public interest lawyers also curate a powerful ethos of valuing individuals and stubbornly refusing to forget the most powerless and the most marginalized members of society.⁶⁰ This commitment strikes creative tension with organizing efforts whose emphasis on group consensus and shared interests often pushes out those least able to afford compromise or to find numerous others in the same position as themselves. To give one example, in the mid-1990s, the Essex County Community Organization (ECCO), a church-based community organizing effort in Lynn, one of Massachusetts' poorest cities, conducted a yearlong process of house meetings and individual conversations to discover the shared concerns and interests of its lowincome members. The largest demographic group in the organization's base consisted of bluecollar, working-poor families whose chief hope was to be able to afford a down payment on a home. As a result, the organization successfully organized this base to develop affordable home

⁵⁷ See Fannie Lou Hamer, Vice-Chair, Mississippi Freedom Democratic Party, Testimony Before Credentials Committee, Democratic National Convention (July 22, 1964), *available at* http://www.calvin.edu/academic /cas/programs/pauleyg/voices/fhamer.htm (last visited Oct. 23, 2011).

⁵⁸ JENNIFER GORDON, SUBURBAN SWEATSHOPS 169 (2005).

⁵⁹ Dwight King-Leatham, Lafayette Averts Union Pickets at Mayors' Meeting, TRI-VALLEY HERALD, Nov. 3, 2011; This is the "Right to Organize Resolution Aldermen will Consider" July 21, THE JOURNAL-TIMES, Jul. 12, 1998, http://www.journaltimes.com/news/article_2220c724-7aa7-5ac8-a566-9f24a96df325.html; Work in Progress, AFL-CIO, Fcb. 28, 2000, http://www.aflcio.org/aboutus/thisistheaflcio/publications/wip/wip02282000.cfm?RenderForPrint=1.

⁶⁰ STEVE BACHMANN, LAWYERS, LAW AND SOCIAL CHANGE 84 (1984) ("The lawyer involved in social change must therefore watch the processes by which the class-in-itself becomes a class-for-itself. Will it be an authoritarian or democratic process? The lawyer, with her training in matters of justice, fairness, and procedures for implementing them, may have a contribution to make beyond diminishing lawyerly elitism.").

ownership opportunities with local banks.⁶¹ The poorest tenants, those still struggling to find even stable rental housing, for whom even a soft second mortgage lay well over the horizon, were marginalized in the agenda-setting process because they did not make up a large enough part of the organization to affect the consensus. It was the lawyers at ECCO's ally, Neighborhood Legal Services, who constantly needled and agitated the organization on behalf of its clientele of highly marginalized, often unemployed and substance-addicted or HIV-positive rooming-house tenants. The lawyers rightly pointed out that their clients' interests were drowning in the organization's mass democratic decision-making process, just as they did in governmental and electoral decision-making processes. Even as community organizers—including myself—scoffed at "rights talk," these legal services lawyers acted as the conscience of a mass organization, preventing its leaders from forgetting the most marginalized among them.⁶²

Finally, lawyers are survivors. Their skills, their profession, and, yes, their privilege, mean that they have a lower attrition rate from social movements than organizers and leaders. Public interest law organizations such as the Center for Constitutional Rights or the National Lawyers' Guild survive to work with new generations. And as survivors, they carry much of the memory in movements whose only history may be oral. Like it or not, lawyers, like academics, are the lucky ones who often outlive their comrades and must be responsible for their transformation into history.

Groups of marginalized people struggling to become powerful by organizing cannot afford to give up the resources and value that lawyers bring to the table. Conversely, lawyers who seek sustainable, structural social change must learn to work with groups that are organizing, developing leadership, and gaining power. *Lawyers, like community leaders, fundamentally need to be in relationships with others, and the extent, strength, and deliberateness of our relationships define our power*. But canonical models of lawyer-group relationships often provide little guidance where client groups are still in the process of forming, and cannot yet easily engage in the unambiguous mechanisms of representation and accountability on which those models rely. Lawyers attempting to do this work fall into a gap in the lawyering paradigm. In the next section, I explore five different concrete models of lawyers working constructively with groups who are still in the process of organizing.

II. MODELS

The purpose of this paper is to address the challenges faced by lawyers working in situations that are often poorly defined, unpredictable, and unfamiliar: the support and representation of inchoate, marginalized groups that are in the process of organizing to become more powerful. In this section, I illustrate five models of lawyer participation in groups that are in the process of organizing. These are not intended to be job descriptions. Nor are they competing strategies. It would be very unwise, if not impossible, to attempt in practice to hew to

⁶¹ Lynn, Brockton Gain Housing-Program Funds, BOSTON GLOBE, Nov. 2, 1995, at 51.

⁶² See Lisa Capone, Helping the Homeless: New Mission to Lift Families Out of Poverty, BOSTON GLOBE, Dec. 17, 2000, at 1; Coco McCabe, Amid Roaring Riches, a Quiet Crisis: Families Scrambling to Find, Keep Affordable Rental Units, BOSTON GLOBE, Aug. 6, 2000, at 1 (explaining that the legal services lawyers brought their clients to ECCO meetings, and helped them make use of the group's formal decision-making procedures to make themselves heard. As a result, ECCO included in its agenda the creation of new affordable rental housing, and also launched a campaign to organize users of state-run "one-stop" job centers, who were being forced into minimum-wage temporary jobs. Legal services clients told their stories at public actions for both campaigns.).

one or another, or perhaps even to know in the moment which model one is practicing. Indeed, a single action may be understood through the lenses of several different models. The value of naming them and setting them out is to provide a vocabulary and a set of landmarks to help lawyers (and those about to become lawyers) imagine how to act and, having acted, reflect on what they have done. I propose these five models as starting points for reflection, argument, and mutation.

The five models 1 will explore in this section are (1) the transactional "Corporate" Model; (2) the "Legal Services as $M^*A^*S^*H$ Unit" Model, in which lawyers provide traditional direct legal services, but target them to an organization's leaders in order to give them protection in their organizing; (3) the "Political Enabler" Model, in which the lawyer provides litigation, research, and drafting in direct support of the organizing process itself; (4) the "Organizing on the Scaffolding of Litigation" Model, in which large-scale litigation provides opportunities and shelter for nascent organizing initiatives; and (5) the "Lawyer as Organizer" Model, in which the lawyer turns to her own web of client relationships as an organizing base in itself. A chart illustrating these models is included as Appendix A.

A. Corporate Model

Though, as I discussed above, the set of rules and protocols developed for representation of private corporations are ill-suited to the complexities of working with a dynamic constituency in the process of organizing, both lawyers and clients will and should try to make what use they can of established roles when possible. The lawyer and the group are engaging in the Corporate Model to the extent that the group has developed an organizational process capable of defining group interests and values, and to the extent that the lawyer represents these interests rather than the legal needs of individual group members.

Further, the Corporate Model is characterized by a strong separation of "core" organizational strategies, from which the lawyer is segregated, and legal circumstances which are the conditions and consequences of "incorporation" as an organization. Here I mean "incorporation" in the broad sense of "becoming united or combined into an organized body,"⁶³ rather than the technical sense of becoming a legal corporation, though the former may indeed sometimes involve the latter. Much of this work is transactional, though the lawyer may sometimes litigate offensively or defensively to protect and preserve the organization's incorporated status.

For example, Wiley Branton, a noted African-American attorney, native Southerner, and collaborator with Thurgood Marshall, drafted bylaws, incorporated, and administered the Congress of Federated Organizations (COFO) and the Voter Education Project (VEP), the civil rights umbrella organizations created to channel federal funding through a minefield of tax-exemption laws and competing organizations.⁶⁴ When COFO's founders were arrested on trumped-up charges by Mississippi police upon leaving their first organizational meeting, Branton advocated for their release.

When Neighborhood Legal Services of Lynn partnered with ECCO, the relationship was for a long time only vaguely defined, but all parties agreed that the lawyers should advise

⁶³ AMERICAN HERITAGE COLLEGE DICTIONARY 688 (3d cd. 1997).

⁶⁴ See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63, at 635–36 (1988); Judith Kilpatrick, Wiley Austin Branton and the Voting Rights Struggle, 26 U. ARK. LITTLE ROCK L. REV. 641, 659–65 (2004).

ECCO's leadership on how to avoid legal liability. For example, NLS lawyers reviewed and

revised ECCO's personnel policies, and helped the organization re-apply for tax-exempt status. While lawyers, organizers, and the organization's leadership continued to eye one another warily and jockey for turf—sometimes in open confrontation—around other aspects of their relationship, this transactional work felt relatively "innocent" to all sides.

Indeed, the Corporate Model may be simply those interactions that are possible between a highly organized constituency and a lawyer when there is minimal trust or familiarity between the two. Its innocence makes it attractive to organizers and leaders who are especially wary of lawyers, and the apparent clarity of the lawyer's role makes it an obvious first answer to the theoretical conflicts between traditional lawyering and organizing.⁶⁵ But its simplicity ultimately limits growth of strong relationships between the lawyer and the members of the organization, preventing either from becoming more skillful at relating to the other, as discussed more fully in the conclusion. The limited relationship prevents the organization from getting all the value it can from the lawyer. There is no provision in this model for the lawyer to interact with the organization's membership in their daily struggles to continue organizing and exercising power, so if the lawyer has skills and knowledge that could be relevant to that process, it will never be known. The transactional work may make use of the lawyer's relationships with institutional players, but not her relationships with other clients. And the lawyer's values and critical eye, developed through personal experience as well as learned from a long tradition of lawyers struggling for social change, are not welcomed. The lawyer is largely a technician.

Perhaps the purest articulation of the Corporate Model is the strict circumscription of the lawyer's role in ACORN Law, the legal office of the former Association of Community Organizations for Reform Now, a grassroots membership organization made up largely of low-income people of color, organized into local, city, and state chapters across the country.⁶⁶ Though ACORN lawyers are required to take training in community organizing, most do not play a role in formulating the organization's issue agenda and strategies.⁶⁷ While ACORN is a famously combative organization, with each chapter usually involved in several issue struggles and negotiations with multiple adversaries simultaneously, its lawyers perform almost entirely supportive work. "At ACORN the legal work is devoted to keeping the corporate machinery oiled and preserving associational rights through court action. Our job is to maintain a structure through which organizers can organize."⁶⁸ By policy, ACORN as an organization does not use impact litigation to achieve social change, and by culture it is extremely wary of allowing lawyers to dominate, or even participate in, group decision-making, identity-forming, and public

⁶⁸ *Id.* at 34.

⁶⁵ See Janine Sisak, If the Shoe Doesn't Fit . . . Reformulating Rebellious Lawyering to Encompass Community Group Representation, 25 FORDHAM URB. L.J. 873, 882 (1998) (explaining that the "innocence" of the corporate model also makes it well-adapted to the use of legal aid organizations whose work is constrained by funding restrictions and describing the innovative transactional work done by Brooklyn Legal Services Corporation to support the development of community institutions without running afoul of the political restrictions attached to federal Legal Services Corporation funding).

⁶⁶ While ACORN chapters have recently dropped the name ACORN and rebranded following negative publicity campaigns against them, I continue to use the name ACORN here because there is otherwise no organizational name that covers the shared history, strategies, tactics, and structures of all of these chapters. "ACORN" remains an organizing model, if no longer a corporate entity.

⁶⁷ Steve Bachmann, *ACORN Law Practice*, 7 LAW & POL'Y 29, 35 (1985). Bachmann also described ACORN's experiment with locating its lawyers both inside and outside the organization, including, for a period, in a separate private but affiliated for-profit law firm. *See id.* at 35.

representation processes.⁶⁹ ACORN Law makes clear in its recruiting materials that lawyers looking for the glory of being in the center of the stage of social struggle need not apply.⁷⁰ In the words of ACORN founder and Chief Organizer Wade Rathke, "[y]ou know, it is not necessarily a colorful area of law, but there is a tremendous amount of work that needs to be done in areas like access to public records and opening up payroll and other deduction systems."71 Indeed, as Rathke notes, transactional work can be innovative and risky. In 1967, the United Farm Workers' brand new in-house counsel, Jerry Cohen, filed papers to set up a new union, the United Peanut Shelling Workers of America. The union had exactly nine members-peanut shellers who worked in a small shed on a UFW-owned ranch. Until then, these nine workers' membership in the UFW had brought the entire union under the National Labor Relations Act's (NLRA) prohibition on secondary boycotts, even though the rest of the union's membership-thousands of farm workers-were not covered by the NLRA as agricultural workers. As a result, the UFW faced loss of one of its most successful tactics. Simply by reincorporating these nine workers into a separate union, Cohen freed the UFW to lead a national boycott of California table grapes over the next three years.⁷² By 1971, the UFW had contracts with nearly all California grape growers, and its membership had grown to 70,000.73

Clever lawyers with a deep understanding of organizing who are willing to take risks may begin in this model, but move into the Enabling Model, below, as they discover ways to open opportunities for organizing in even the most seemingly technical projects.

I do not mean to suggest that all or even some lawyers do or should adopt these models' boundaries as their role boundaries. In nearly all cases in which lawyers collaborate with organizing efforts, they are expected to play the corporate role to some extent, even when they are also simultaneously engaged in activities described under another one of the models below. But they are acting as corporate representation insofar as they are engaging in the fundamental action of recognizing the organization, of seeing individuals first in their organizational capacity as group members, leaders, and representatives, rather than as individuals with personal needs. As always in organizing, recognition is a crucial step that calls for enormous respect for the organization. For that reason, it is inappropriate and inauthentic where the group has not progressed through the organizing process to the point where the group members themselves have recognized the organization. This means more than simply that they have named it and pledged allegiance to it. Rather, the leaders must be disciplined in standing for the whole, their constituency equally disciplined in holding their leaders accountable; all must to some extent recognize the difference between their private selves and their public organizational selves. When a group is not practicing organization in this way, a lawyer who attempts to engage in the Corporate Model is practicing fantasy.

I have described above how organizing is an endless process; a group that strays from that discipline is an inappropriate partner for the Corporate Model, even though it might be

⁷² See Jennifer Gordon, Law, Lawyers and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today, 8 U. PA. J. LAB. & EMP. L. 1, 15–16 (2005) [hereinafter Gordon, Law, Lawyers and Labor]; see also MARSHALL GANZ, WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT, 216–17 (2009).

⁷³ UFW Chronology, UNITED FARM WORKERS, http://www.ufw.org/_page.php?menu=research&inc= page.php?menu=research&inc= history/01.html (last visited Nov. 6, 2011).

⁶⁹ *Id.* at 33–34.

⁷⁰ *Id.* at 34.

⁷¹ Quigley, *supra* note 43, at 461.

venerable in age and have all the trappings of organization, e.g. hierarchies, titles, handshakes. It is not only when approaching the new, inchoate group that the lawyer must be honest and critical before engaging in corporate lawyering. Indeed, one of the shortcomings of the traditional commercial corporate lawyering model is that it does not provide for this moment of approach, the reckoning of whether authentic recognition is possible.

B. Legal M*A*S*H Unit

Organizing often generates legal casualties-leaders arrested for civil disobedience or in retaliation; opponents suing the organization or leaders; leaders or organizers who make mistakes when venturing into unfamiliar institutional territory. In addition, participants in organizing efforts are often already facing legal liabilities such as eviction, benefit termination, and bankruptcy. The M*A*S*H Lawyer in this model handles short-term legal "first aid" to keep the leaders up and organizing. Like the corporate lawyer, the M*A*S*H Lawyer does not directly advance the core goals of the organization-his legal claims are not the same as the constituency's principal demands. Unlike the Corporate lawyer, this lawyer relates directly to individual members of the constituency. Indeed, the M*A*S*H Model shares many assumptions with what William Simon has named the "conservative" understanding of law: that legal needs are, like medical needs, a detour from the productive sphere (in this case, the public, political sphere), to be "solved" by the lawyer with minimal distraction to the client.⁷⁴ Nevertheless, the M*A*S*H Model is not to be confused with traditional delivery of legal services to individuals. Crucially, over time, M*A*S*H lawyering is targeted to indirectly support the constituency's organizing capacity by freeing up leaders to address their core goals-it is more of a field hospital than a civilian emergency room.

Jennifer Gordon writes how The Workplace Project, a combined legal services and immigrant worker organizing project in Hempstead, Long Island, developed a triage system to handle workers who walked in the door with immediate crises, such as denied paychecks, work-related injuries and threats of arrest or deportation.⁷⁵ The worker might first sit with a lawyer, who, playing the traditional legal services role, could attempt to find an immediate solution that would at least put food on the worker's table that night or assuage his fears of deportation.⁷⁶ Only after the immediate heat was off would the worker talk to an organizer and be recruited to participate in organizing efforts to change the root conditions that had led to his predicament. The Workplace Project has recognized that, while the comfortable do not organize, neither do the panicked, the terrified, or the incapacitated.⁷⁷

Similarly, Make the Road New York, formerly Make the Road by Walking, is a community organization based in New York City that employs lawyers, legal interns, and legal advocates to provide legal services to organization members.⁷⁸ Not only does this service help

⁷⁴ Simon, *supra* note 46, at 472–73.

⁷⁵ Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 430, 437 (1995) [hereinafter Gordon, *We Make the Road by Walking*].

⁷⁶ *Id.* at 442.

⁷⁷ Id.

⁷⁸ See Legal and Support Services, MAKE THE ROAD NEW YORK, http://www.maketheroad.org /howwework_legal.php (last visited Sept. 19, 2011) (describing the holistic approach of Make the Road's legal services department); see also Rose Cuison Villazor, Community Lawyering: An Approach to Addressing Inequalities in Access to

keep community leaders on their feet and organizing, it also serves as a recruiting tool. New potential leaders join the organization to get access to the exclusive legal services, then stay and work on organizing.⁷⁹ This aspect of M*A*S*H lawyering—its restriction to group members (formally or informally defined), and therefore its requirement that individuals join the organizing effort if they want legal services—is its sharpest break with traditional legal services' value of "access for all."

Some critics see this requirement as a form of unethical compulsion, noting that the better off can obtain legal services without pledging servitude to their lawyers.⁸⁰ Such criticism rests on two incorrect assumptions. The first is an insistent view of poor or marginalized clients as bundles of weakness and need, so that all power and resources in the lawyer-client relationship must flow from the lawyer. The "liberal asking" lawyer, in William Simon's terminology, reinforces her own power by adopting a pose of benevolent giving, but in the process also enforces the client's powerlessness and dependency.⁸¹ To ask the client for something in return requires the lawyer to appreciate the knowledge, skills, and resources that even the most marginalized client brings to the table (even when the client himself may not see them), as well as to acknowledge the limits of the lawyer's own power. Such a reversal can be more generous and imaginative than the pure charity of the traditional legal services model. The second assumption relied on by critics of the membership-for-services requirement is the expectation that participation in organizing is something unpleasant, a cost exacted on the client. But organizing can be an opportunity for those who participate, which is why the poor and marginalized have been doing it for free for thousands of years. It is simply not true that for the organization to gain something from the individual, the individual must lose something to the organization. Organizing works because both parties to a relationship gain power. This is precisely what Loomer means by "relational power."82

The M*A*S*H Model makes great use of lawyers' special access to the courtroom. It may also mobilize lawyers' relationships and knowledge of institutions, if the lawyers are repeat players in the fair hearings, housing courts, and criminal courts in which leaders find themselves tangled. Lawyers indigenous to the community where the organizing effort takes place can act as "fixers," eradicating small problems to enable leaders to concentrate on larger issues. Lawyers may also be freer to incorporate some of their values than in the Corporate Model. If, as at The Workplace Project or Make the Road, they are an entry point for leaders into the organization, their focus on the neediest and most disempowered individuals can pressure the organization into comprehending and accommodating these souls who otherwise would not float to the top of a rough-and-tumble group formation process.

On the other hand, this model is more vulnerable to the distractions of legal thinking than is the Corporate Model. The seductive immediate payoff of traditional legal services delivery

Health Care for Poor, of Color and Immigrant Communities, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 35 (2005) (discussing Make the Road's successful integration of legal services and organizing as a model of community lawyering).

⁷⁹ Interview with Andrew Friedman, Director, Make the Road by Walking, in Brooklyn, N.Y. (May 5, 2005); Interview with Deborah Axt, Coordinator of Legal and Support Services, Make the Road by Walking, in Brooklyn, N.Y. (July 14, 2005).

⁸⁰ See, e.g., Scott L. Cummings & Ingrid V. Early, A Critical Reflection on Law and Organizing, 48 UCLA L. REV. 443, 495–98 (2001).

⁸¹ See Simon, Visions of Practice, supra note 48, at 475–76 (critiquing the liberal model of asking a client to define his or her interests).

⁸² Loomer, *supra* note 30.

competes with the long-term power-building of organizing. It is dangerously easy for the lawyers' mission to creep into the core struggles of the organization, until the lawyers are servicing the leaders full-time. Arguably, this has happened in many labor unions, where the "servicing model" and grievance processing have eclipsed organizing as the primary, and often only, ways that members experience the power of the union.⁸³

C. Lawyer as Political Enabler

The Enabling Model bears some resemblance to the Corporate Model, in that the lawyer is concerned with group interests and organizational formation. But this model is distinct from the Corporate Model in that it is concerned specifically with the group's interest in continuing to organize and to build power.

The Enabling Lawyer may engage in the full range of lawyering activities, such as litigation, negotiation, advocacy, drafting, and research, but always toward the goal of facilitating or opening spaces for organizing and the exercise of relational power. For example, the lawyer may work to defeat injunctions against organizing or demonstrating; find creative loopholes in existing law into which community leaders can fit their demands; uncover the legal leverage which organizations can use to target their organizing; use litigation to attack particular figures or institutions that are collaterally attacking the organization and preventing it from engaging with its real political target; and file lawsuits to slow down institutional processes and give organizing processes time to work. The Enabling Lawyer will rarely, if ever, style the group's ultimate demands as legal claims. Rather, she will use her practice to enable the group to make its own demands and seek its own victory through political, economic, social or cultural means.

Jennifer Gordon's study of the role of United Farmworkers' General Counsel Jerry Cohen is a concrete and moving portrait of the Enabling Lawyer in action.⁸⁴ The UFW was the first widely successful and sustainable union organized among the migrant workers of California's agricultural valleys. In the 1960s and 1970s, they used an innovative hybrid of labor and civil rights movement strategies to win industry-wide collective bargaining agreements and change power relationships in the grape, lettuce, and other major agricultural industries. The UFW rarely attempted to achieve its goals-higher wages, worker safety, hiring halls, dignity and self-determination-by suing for them. Rather, they mobilized their power-developed through years of exhaustive face-to-face relationship building, recruitment and training of thousands of individual farm workers-into strikes, boycotts and dramatic nonviolent action.⁸⁵ They forced their opponents to the negotiating table using economic, political, and cultural strategies. But throughout their struggle, the UFW legal department engaged in a frenzy of litigation: overturning injunctions that outlawed picketing, challenging "backdoor contracts" by the rival Teamsters Union, exposing conspiracy agreements signed among growers, and defending the legality of secondary boycotts. Rather than replacing the farm workers' relational power with legal power, Cohen and his colleagues used legal power to clear the paths for the farm workers themselves to

⁸³ See Trevor Colling, What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights, 35 INDUS. L.J. 140, 146–47 (2006); Christina Cregan, Can Organizing Work? An Inductive Analysis of Individual Attitudes Toward Union Membership, 58 INDUS. & LAB. REL. REV. 282, 283–84, passim (2005); Matthew W. Finkin, Bridging the "Representation Gap," 3 U. PA. J. LAB. & EMP. L. 391 (2001).

⁸⁴ See generally Gordon, Law, Lawyers and Labor, supra note 72.

⁸⁵ For robust tellings of the UFW's early organizing, see JACQUES LEVY, CESAR CHAVEZ: AUTOBIOGRAPHY OF THE LA CAUSA 258–59 (2007); *see also* GANZ, *supra* note 72, at 258–60.

mobilize and win.

Notably, the UFW in its early years may not have had a level of formal organization and stability that would have justified a Corporate approach. Nor was its legal department cabined from the movement's core activities, as in the Corporate Model. Rather, Cohen frequently sat at the table with Chavez, Dolores Huerta, and other lieutenants and organizers, helping to plot strategy and brainstorm tactics. He was also at the negotiating table with growers, hammering out the details of union contracts. He was simultaneously in the thick of things and yet never in the way of the organizing itself.⁸⁶

Research and education are among the most frequent activities of the Enabling Lawyer. Jack Minnis, legal researcher for the Student Nonviolent Coordinating Committee (SNCC), was playing this role when he wrote Stokely Carmichael in 1965 to point out that "Alabama Law says it is possible to bring into existence a totally new political party," provided that it choose a visual symbol that does "not resemble in any way" the white rooster of the Alabama Democratic Party (student volunteers in Lowndes County chose a black panther).⁸⁷

Because this role is not modeled on a traditional lawyering role, such as corporate counsel or legal aid, its boundaries are less well defined than the boundaries of the Corporate or M*A*S*H Models. Its indeterminacy is both a danger and an opportunity. On the one hand, a lawyer so closely involved in the core organizing process may begin to dominate decision-making and agenda-setting in exactly the way that organizers like Ron Chisom fear.⁸⁸ Additionally, with the lawyer taking such a prominent public role, she can easily come to be seen as the spokesperson for the organization. The lawyer certainly must represent the organization and tell its story in court, where her portrayal of the organization can be frozen into legal reality if, for example, the court lifts an injunction to allow the organization to picket only as long as its activities and demeanor match those described by the lawyer in her argument. Perhaps the most notorious example of this kind of legal-tail-wagging-the-organizational-dog was Martin Luther King's painful turnaround at the foot of the Pettus Bridge during the second aborted Selma-to-Montgomery march. There, lawyers had represented the SCLC's nonviolence to a federal judge as a desire to *avoid* violence, rather than to expose state violence; as a result, the judge partially lifted an injunction in order to allow activists to march just far enough to avoid provocation, but not far enough to create the kind of moral drama they needed.⁸⁹

Similarly, intertwining lawyers into a group's core activities means that lawyers' missteps can tactically impede organizing. Cohen himself tells of Chavez's disappointed outrage when Cohen triumphantly announced that he had defeated an injunction forbidding the farm workers from using bullhorns in public. Chavez had seen the injunction as a golden opportunity to make headlines with a graphically unfair arrest. Cohen's "victory" ruined Chavez's tactic and foreclosed what could have been an important experience for participating farm worker leaders.⁹⁰

On the other hand, the indeterminacy of the Enabling Lawyer's role presents opportunities for the lawyer to activate the full range of her skills, knowledge, access, and

⁸⁶ See generally Gordon, Law, Lawyers and Labor, supra note 72, at 46–50; GANZ, supra note 72, at 234– 35; LEVY, supra note 85, at 261, 313, 316, 339, 345, 479, passim.

⁸⁷ TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 316 (2006).

⁸⁸ See Quigley, supra note 43, at 457–58 (discussing the risks of lawyers creating dependency as leaders of organizations).

⁸⁹ DAVID GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965, at 75, 112 (1978).

⁹⁰ Gordon, Law, Lawyers and Labor, supra note 72, at 16 n.47.

relationships. The organizers, leaders, and organizing participants who can handle such a complicated relationship can get the full value of lawyers with whom they associate. Just as importantly, the multiple points of contact and the need to be conscious of constructing the relationship at every point provide opportunities for learning and growth. Where the Corporate Model lawyer is quarantined from the organizing process, the Enabling Lawyer must learn a great deal about organizing. If the lawyer does not come to dominate and reframe discussion, she will learn to think outside of the traditional litigation box. It will often be useful for the lawyer to bring unwinnable actions in order to advance political goals by attracting public attention or forcing opponents to commit resources and reveal information about themselves (UFW counsel were especially talented at this).⁹¹ Similarly, if the participants in the organizing effort do not simply either defer to or shun the lawyer, they can learn something of the lawyer's knowledge and way of seeing systems. Perhaps more importantly, they have the opportunity to learn and perform a new role: that of partners in power with the lawyer, where previously they may have approached lawyers only in weakness or fear.

When both sides are willing to question their roles and learn from one another, they can begin to work as a more powerful whole. For example, when ECCO organized unemployed workers to demand reform of the state's "One-Stop Career Center" for the unemployed, lawyers from Neighborhood Legal Services advised leaders on how to translate their grievances into the language of the regulations governing the Center. But the lawyers' first draft of demands was unsatisfying to the workers, because the lawyers had, acting from habit, drafted demands that would make the Center easier for legal services lawyers to act on behalf of clients. Demands such as "inform all users of their right to be accompanied by legal counsel when they meet with an agency officer," and "post in a visible place the guidelines governing the Center's use of funds" left workers dissatisfied. For their part, the lawyers, with their knowledge of the system, pointed out that the center's director would never agree to worker demands that would force her to violate federal regulations and risk losing the center's funding. After a contentious meeting, the lawyers came back with a draft set of rules requiring the center to spend all of its job training funds for any given quarter (the center was routinely sending most of its funds back to the state, unused), and the leaders enthusiastically planned a successful action to pressure the center director to agree to the rules. If the lawyers had negotiated alone with the center director, they could easily have won a set of reforms meaningless to the center's users. If the workers had gone in without the lawyers, they might never have understood the institutional and legal pressures pushing them back out the door. The agenda crafted by workers and lawyers together was faithful to the real goals of the workers-to gain access to job training and decent job opportunities-while being legally savvy enough to be winnable. And, more importantly in the long run, each learned how to relate to the other, enabling even more nuanced and intricate collaborations in the future.

D. Organizing on the Scaffold of Litigation

This model flips the organizing-lawyering relationship of the first three models on its head. Here, litigation is the principal strategy for achieving the constituency's demands, but litigation is conducted in such a way as to maximize opportunities for organizing in the shadow or margins of the case. I approach this model warily, as its most common form is a weak version in which sympathizers are mobilized to engage in quick, superficial displays in support of lawyer heroes. Beltway public interest firms on both the right and left have grown adept at busing in

⁹¹ *Id.* at 21.
supporters to picket outside the Supreme Court whenever the firms' lawyers are arguing their impact cases inside.⁹² These activities give the appearance of an organizing effort, but in fact they fulfill none of the criteria of organizing. They provide little or no learning and development to demonstrators, and they build no relational structures amongst participants, other than the relationships that develop incidentally between demonstrators passing the time with conversation—no more than would be developed at any supermarket with long checkout lines. In addition, they are ephemeral, with demonstrators rarely seeing one another again, let alone continuing to operate a lasting organizational structure that they can apply to other struggles. The organization's staff develops the capacity to mobilize demonstrators, but those demonstrators may discover a shared identity as proponents of a common issue, but this shared identity is as superficial as cheering for the same baseball team—they will separate as soon as the next issue comes along.

This model concerns the use of litigation—not merely argument—as a process that provides a timeline, forum, and focal point for authentic organizing. For example, in the late 1980s, The American Center for Law and Justice (ACLJ), a conservative Christian public interest firm, won a series of high-profile cases establishing the right of religious groups to use school facilities for their activities. The ACLJ, in coalition with grassroots evangelical groups such as the Christian Coalition, conducted mass organizing during this litigation—but *not* to turn out busloads of supporters to the Supreme Court. Instead, they conducted a broad grassroots organizing campaign, "Ripe for the Harvest," creating a network of hundreds of high-school bible study groups in towns across the country, ready to either take advantage of newly opened school buildings or conduct pray-ins outside of still-closed ones.⁹³ This was impact litigation that grew the movement at the grassroots, strengthened local church congregations, and developed hundreds of student leaders. When scattered schools resisted the Supreme Court's order to open their doors to religious groups, this robust, multi-state network of organized students stepped up to push for enforcement of the law, turning one of impact litigation's weaknesses, difficulty of enforcement across broad areas, into an opportunity for public attention and leadership development.⁹⁴

In some instances, as with the ACLJ above, high-profile litigation helps galvanize a national movement, focusing and mediating local groups. But small-scale litigation may be even more effective as scaffolding for the development of local organizing. Micro-litigation in municipal bread-and-butter forums such as housing, small claims, and family court, with their quick pace and relative informality, provides a surprising number of opportunities for group action and the emergence of individual leaders. More importantly, municipal and local courts are often already familiar, even integral mechanisms in low-income people's day-to-day life and relationship-making struggles. For better or worse, housing court is no rarified place of retreat for the resolution of extraordinary disputes that threaten to disrupt residential life; it is more often than not the meeting place of first resort for landlords and tenants to work out routine bookkeeping and maintenance issues. It is not uncommon in many neighborhoods for a tenant

⁹² See e.g. CLINT BOLICK, VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE 182 (2003) (describing the hero lawyer emerging from the Supreme Court building after arguing in favor of school vouchers: "Our rally dwarfed theirs I plunged into the crowd, shaking dozens of hands and exchanging high-fives along the way."); cf. Lucie White, Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987–88).

HANS J. HACKER, THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION 25 (2005).

⁹⁴ Id.

who has never met her landlord to be on a first-name basis with her landlord's lawyer.

As public spaces, in my experience, these courts do not work well. They are strictly and often abusively regulated according to arcane procedural rules by frustrated judges appointed by local elites. But their centrality to community power relations means that litigation there presents opportunities to alter those relations, and that lawyers for low-income people play an important role in the transformation of these public spaces.

My own experiences with organizing on the scaffolding of litigation have taken place in New York City Housing Courts. The state created these courts in the early 1970s, in response to pressure by the tenant movement, to provide a space for the recognition of tenants' rights to repairs and decent living conditions. After forty years of domination by the professional landlords' bar, the Housing Courts have been reshaped to quickly facilitate the enforcement of landlords' rent claims against tenants en masse, often making it easier and cheaper for a landlord to litigate a month's late rent or a ledger anomaly than to confront a tenant in person. What is left from the original vision is one Housing Court part (out of ten parts in each borough) where tenants can sue their landlords for the correction of housing code violations. This part (redundantly called the "HP," or "Housing Part,") is a frequent haunt of lawyers from Legal Services or Legal Aid, as well as of the more vocal, angry, informed (or, as the landlords' bar refers to them, "problem") tenants. Importantly, the HP part is the only Housing Court part in which tenants can bring group actions with multiple plaintiffs.⁹⁵

"HP" actions seek injunctions ordering landlords to perform repairs, but they can also result in costly civil fines to landlords whose buildings have deteriorated considerably, or who refuse to comply with court orders. Unlike large-scale civil rights litigation, HP actions are often resolved in one or two court appearances, the law involved is relatively straightforward, and cases are heavily fact-based.

Professional landlords have long ago learned how to ignore or neutralize traditional tenant organizing efforts. They send low-level service employees to take the heat at angry building lobby meetings, while the actual owners remain anonymous behind generic shell corporations.⁹⁶ Tenants looking to take the fight to where their landlords live and work end up gathering impotently at one of the notorious mailbox stores where most building owners keep the post office boxes that are their only registered address. Tens of thousands of tenants in Brooklyn know their landlords only through a single address—199 Lee Avenue—a tiny post office supply store in Williamsburg, whose owner is legally prohibited from giving out information about boxholders.⁹⁷

Thus, organized tenants find that the traditional public spaces of building lobbies and streets have been evacuated of power. But in the HP part of the Housing Court, as with all civil litigation, landlords can be subpoenaed and forced to appear, or at least to send representatives fully authorized to agree to demands and be held accountable. Often, when a landlord refuses to meet with a nascent tenant organization, and a legal services attorney initiates an HP action on the organization's behalf, the first court appearance becomes, in effect, the meeting that the tenants had originally sought.

In one such instance, I represented a newly-organizing group of tenants from a severely

⁹⁷ Id.

⁹⁵ See N.Y. CITY CIV. CT. ACT § 110 (McKinney 2011); ADMIN. CODE OF THE CITY OF N.Y. § 27-2115(h).

⁹⁶ See Nekoro Gomes, Who's In Charge Here Anyway, CITY LIMITS (Oct. 19, 2009), http://www.citylimits. org /news/articles/3823/who-s-in-charge-here-anyway (discussing the anonymity of landlords in New York City and potential legislation that would require building owners to register their names, residences and business addresses).

deteriorated building. The building had recently been bought by an abstractly business-minded investor landlord whose goal was to concentrate on renovating vacant apartments into luxury units and attracting high-income renters, while making no investment into the dilapidated apartments of the long-term rent stabilized (and thus, less profitable) tenants. Following the usual real estate naming system, the landlord was known only as "[address of building] LLC." The registered address was a post office box. The property deed on record with the city was signed by someone with a common name. I had joined in a few of the tenants' early meetings and met with a number of them in their apartments, where they pointed out the leaks, broken door locks, smoking light fixtures, and sagging ceilings that had accumulated over months of the landlord's neglect. The tenants had requested a meeting with the landlord, but been refused: he would meet with any of them individually, but never together.

Facing immediately hazardous conditions in their homes, the tenants asked me to represent them in an HP action. As an attorney, I drafted and filed the papers necessary to start the case and lay foundations for later arguments, and served them on the landlord's post office box. I also filed a subpoena requiring a principal of "[building address] LLC" to appear. At the next tenant meeting, tenants signed up to attend the next court date, at which we would directly confront the landlord. On that date, half a dozen tenants arrived in court with photographs and other evidence from their apartments-Elizabeth M brought a pill jar full of dead bedbugs she had collected from her children's bedroom. The judge, eyeing the group nervously in anticipation of a long afternoon of testimony, sent us off to a conference room to talk settlement. Suddenly, the half-dozen tenants were sitting around a long table with their landlord, having the meeting he had refused earlier. They explained their photographs, with a court staffer interpreting between Spanish and English. As they met, other court staff gathered around the edges of the room to watch. When Elizabeth held up her bedbug jar, the staffers gasped; when the landlord blustered, they laughed at him. When the landlord filibustered, as a group we stood up, threatening to walk away from the table to go see the judge. Knowing he was beaten, the landlord signed a consent agreement-enforceable as an order of the court-to perform all the repairs. More importantly, he also agreed to meet personally with the tenant association every month from then on. If he failed to do so to the tenants' satisfaction, they and he knew that they could drag him back into court for contempt.

This was an organizing victory, not a litigation victory. An organized group confronted their powerful landlord face-to-face, winning concrete demands, including, most importantly, recognition of their tenant association and a commitment to meet and deal with them in person at their building from them on. This commitment reinvested the traditional space of the building lobby as a meaningful public space where the tenant association could grow and tenant leaders could do public business with the landlord in the future.

But this was more than simply bargaining in the shadow of the law. The HP proceeding created the only public space in which such bargaining was even possible. Its status as a legal forum forced the landlord to the table, while its informality allowed the tenants to take charge once there. And the building lobby was not the only space transformed and reinvested; the Housing Court—which had been, and would continue to be, an unfortunately repeating part of low-income tenants' lives—was transformed; the tenants had taken over one of its rooms, the court staff had been reduced to spectators, and the tenants had begun to understand the courthouse as a place where tenants far outnumber landlords, lawyers and judges.

The litigation supported the tenants' organizing in other ways as well. By forcing them to follow a timeline, it helped these tenants to overcome their inertia and tendency to put off or avoid confrontation. The looming court date created a sense of urgency as tenant leaders worked

to mobilize their neighbors to attend. The expedition to the courthouse heightened the importance of the meeting there. Tenants dressed up and prepared their statements, rather than merely venting their anger as they comfortably did when meeting in their own building The same (limited) formality that usually makes Housing Court an education in confusion and impotence was, in this case, a lesson in how to conduct public business in a public place. In other words, the litigation provided opportunities for the tenants to develop their public leadership skills, strengthening their organization and equipping them to better advocate for themselves in future conflicts.

By way of contrast, I observed one of the worst misapplications of this model during the legal and political battles leading up to a crucial Supreme Court argument on affirmative action. A group of student leaders, catalyzed by the court case, were organizing in support of affirmative action. They had recruited fellow students to the cause by interviewing them for a documentary on what affirmative action meant to them in their lives; they had then invited all interviewees together for a screening of the documentary and a discussion. As a law student at the time, I was there for the screening. The effect of seeing ourselves on the screen gave students a similar experience to Mr. Domingo's upon hearing his voice amplified at ECCO's campaign action. Students took ownership of the meaning of affirmative action and began to articulate a group definition in which we were publicly invested as a group. Unfortunately, the process was interrupted by a lawyer involved in the actual litigation, who would leave for Washington the next day to help the defense team prepare oral arguments. "You're all wrong," he said after receiving a round of well-earned applause for his work on the litigation. "Affirmative action is about giving university administrators the freedom to craft a diverse student body. That's all it's allowed to be about, and that's all you should be talking about." The discussion was over. At the start, there had been a large turnout of students who opposed affirmative action-not to heckle or bring down the meeting, but to watch themselves as part of the documentary. They had been part of the discussion, a few even saying that they felt they could support the group definition of affirmative action being developed there. Once the lawyer took the floor, they left, along with all the supporters who already understood the legal argument and were bored to hear it again. Though affirmative action in university admissions most directly affects students, the lawyer relegated students to the role of cheerleaders. By disrupting the student organizing process, the lawyer ensured that the high profile case would leave behind only legal precedent, with little relational power available for exercise outside of court. He ensured the students' dependence on lawyers.

But this experience also shows that impact litigation *can* catalyze organizing, by providing a dramatic public story in which individual stories can take on a larger meaning. Before the Supreme Court agreed to hear the affirmative action cases, there was ample interest among students in organizing to preserve, expand, or improve affirmative action. But there had been few moments when one could organize on one campus and know that thousands of others were organizing at the same time across the country. The litigation, because it was trans-local, helped occasion a movement.

It is dangerous to rely on high-profile events to get people to organize, for the same reason it is dangerous to rely on charismatic leaders—the catalyzing event or person will pass, and in the meantime the followers do not develop the self-reliance to continue on. But high profile impact litigation can nurture organizing when both lawyers and organizers organize deliberately around what will come *after* the final decision (rather than organizing *for* the decision), as in the case of the ACLJ's conservative Christian litigation discussed above. Like many of the strategies considered in this paper, there is nothing necessarily innovative or cutting edge about such mindful use of litigation. It has been a common practice for decades, though it is often overlooked when it comes time to draw lessons.

Indeed, the practice of organizing for the aftermath of judgment existed at the heart of what has become a common example of supposedly pure impact litigation: the LDF's school desegregation campaign of the 1940s and 1950s. In fact, that campaign was conducted in such a way as to nurture dozens of local organizing efforts through (often contentious) coordination with the NAACP's grassroots membership. The dozens of black teachers' associations organized across the south in order to act as plaintiffs in teacher pay equalization suits brought by LDF are often neglected in the narrative of the litigation campaign.⁹⁸ High profile lawyers such as Thurgood Marshall or Spotswood Robinson would quickly win a local lawsuit, and then transfer control to the local teachers' association to continue negotiating the implementation of the court's order.⁹⁹ Teachers who had never in their careers protested their conditions now learned political skills necessary to keep their groups together, achieve consensus, and bargain with white officials-Marshall would often drop in unexpectedly to criticize their tactics and brusquely train them on how to play political hardball.¹⁰⁰ Indeed, one of these teachers, Septima Clark, went on to pioneer the Citizenship Schools movement through which thousands of local people became involved in the Black freedom struggle throughout the South.¹⁰¹ Notably, LDF attorneys did not do any organizing themselves. Instead, they used their special access to legal forums and the promise of the sweeping power of litigation to enliven local citizens and create an institutional context into which organized teachers could plug themselves (it would have made little sense for black teachers to organize and attempt to negotiate with white officials before the materialization of the legal stick). Again, litigation provided the scaffolding on which a group could organize and advocate for itself.

The Scaffolding Model shares an uneasy border with the Enabling Model; both lawyers engage in large-scale litigation and group representation, and both hope to carve a path for organizing to follow. But unlike Enabling Lawyers, Scaffolding Lawyers do not shy away from naming the constituency's central demands among their legal claims. The power they wield in litigation is greater than what has been to that point developed by the organization or movement. The constituency grows its power and takes possession of the victory in the course of enforcing it.

This model is attractive to many lawyers because it places them in a high-profile, challenging role. It is also popular with movement strategists because of its potential for catalyzing sweeping, trans-local movement activity. Impact victories also tend to have great expressive effect, asserting rights in the best sense of the word—as invitations to those on the margins to be included as "first-class citizens" in the community. But this model also comes the closest to overwhelming the core values of organizing. Issues are cut, timing is chosen, goals are defined, arguments are formed, and plaintiffs' stories are told at the lawyers' discretion. Of

¹⁰⁰ Id.

⁹⁸ MARK TUSHNET, THE NAACP LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-1950, at 18– 19, 43–45, 58–60 (1987).

⁹⁹ RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 213–15 (Alfred A. Knopf ed. 2004).

¹⁰¹ "While living in Columbia [South Carolina], during World War II, she had joined the teacher-salary equalization campaign of the National Association for the Advancement of Colored People (NAACP), an act she characterized as her first 'radical' act, 'the first time I worked against people directing the system for which I was working." Katherine Mellen Charron, *We've Come A Long Way, in* GROUNDWORK: LOCAL BLACK FREEDOM MOVEMENTS IN AMERICA 116, 119 (Jeanne Theoharris & Komozi Woodard eds., 2005) (quoting Septima Clark, ECHO IN MY SOUL 81, 82 (1962)).

course, lawyers may consult with community leaders, but consultations with disorganized constituencies may be costly or impossible, and nothing holds lawyers accountable to any consultations they stoop to undertake. The idea of lawyers taking it upon themselves to be movement-makers clashes with the bottom-up, power-shifting nature of relational organizing. Community leaders may control the mechanisms of enforcement of the legal victory, but they organize only within the bounds set by the lawyers' claims. Perhaps the most attractive feature of this model is how easily it can be adopted by legal organizations that are designed for engagement in traditional impact litigation or legal services provision. It does not require that the lawyer learns new skills or even operates in an unfamiliar forum, but it does require that she act with mindfulness and discipline. And this may mean conflict with funders, nonprofit boards, and pro bono partners—the litigator's more immediate "constituency." For this reason, the Scaffolding Lawyer is the most vulnerable to diversion both by capture and by self-delusion.

E. Lawyer as Organizer

This model does not refer to lawyers who quit lawyering altogether and become organizers. In the Lawyer as Organizer Model, lawyers initiate their organizing through the structural context of direct delivery of legal services. The base of the organizing effort is often some subset of the lawyer's client base. Agenda-setting begins when the lawyer notices patterns among the issues that clients bring to her, and the motivation to organize may come from limitations the lawyer encounters in her ability to resolve client issues through legal means alone.¹⁰² Indeed, the growth of attorney-founded Workers' Centers may be evidence that this model is gaining popularity.¹⁰³ Increasingly, lawyers are caught in the conflict between the ideals of legal service provision—equal justice and individual rights—and its frustrating reality—pyrrhic victories, resource shortages, and political restrictions attached to funding.¹⁰⁴ Under such pressure and limitations, attorneys may increasingly turn their practice towards organizing.

Jennifer Gordon documents a transition from service provision to relational organizing in her narrative of the development of The Workplace Project.¹⁰⁵ The Workplace Project began as a one-lawyer storefront legal services provider for immigrant laborers. As Gordon looked beyond the limited fixes available through litigation, she gradually developed a "Workers' Committee" consisting of clients and former clients facing common issues.¹⁰⁶ As the Workers' Committee's organizing activities made up a larger and larger part of the Project's practice, she hired a fulltime organizer.¹⁰⁷ The Committee eventually changed the Project's mission so that organizing was foregrounded and legal services were relegated to a M*A*S*H role.¹⁰⁸

Ideally, this model is not a static structure, but transitions from pure legal services

¹⁰⁸ *Id.* at 446.

¹⁰² See, e.g., Gordon, We Make the Road by Walking, supra note 75, at 438, 443.

¹⁰³ See Janice Fine, Worker Centers: Organizing Communities at the Edge of the Dream, 50 N.Y.L. SCH. L. REV. 417, 426 (2005–2006) (discussing the emergence of worker centers and evaluating the various worker center models).

¹⁰⁴ See, e.g., Tom Condon, Equal Justice for All Becomes More Elusive, HARTFORD COURANT, Dec. 22, 1996, http://articles.courant.com/1996-12-22/news/9612220188_1_legal-aid-society-legal-advocates-neighborhood-legal-services.

¹⁰⁵ Gordon, We Make the Road by Walking, supra note 75, at 428–30.

¹⁰⁶ *Id.* at 430.

¹⁰⁷ Id.

delivery to one of the models discussed above. Unfortunately, not all such efforts are as successful as the Workplace Project. The organizing effort can become stunted by the centrality of the lawyer (and perhaps his limited competence as an organizer), so that the lawyer, rather than decreasing the constituency's dependence on him as a lawyer, has only added a further dependence on him as an organizer. The lawyer has "his" group of plaintiffs, which engages in "extra-legal tactics." This is the paradox of the Lawyer as Organizer Model: while at first it appears the most radical enactment of the core values of organizing, in practice it often aggrandizes and foregrounds the lawyer. Additionally, this model may produce organizations dependent on a central figure who is doubly mystified—once as a lawyer, and again as a visionary. This problem is often caused by an error typical of trained lawyers: when confronted with obstacles, lawyers are trained to rely on their own counsel and develop their own solutions. This reflex may prevent lawyers from searching for already existing organizing efforts and community leaders, and expanding the resources available to the organizing process.

But what about situations where there is no readily available organizing effort for the lawyer and client to work with? What if the lawyer's perception that she is on her own is not the result of a self-aggrandizing reflex, but of an informed analysis? Or what if the only available organizations are corrupt or unresponsive to the client and his interests? Certainly a lack of powerful, democratic organizing amongst marginalized constituencies is more the rule than the exception in most parts of the United States. There indeed the lawyer must begin with what she has-her relationship with her clients-but should work toward differentiating the roles of lawyer and organizer as soon as possible, as Gordon did when she hired a full-time community organizer. The lawyers who began Make the Road by Walking also mitigated their own leadership somewhat by immediately seeking out relationships with community leaders (in particular with the popular local parish priest), rather than basing the organization entirely on their own client networks.¹⁰⁹ From the start, there were always leaders in the organization who were not dependent on the lawyers either for legal services or for their relationships with other leaders. Additionally, Make the Road's staff structure was decentralized from its beginning, so that it was impossible for lawyers to make organization-wide decisions except via a board that also included community leaders.¹¹⁰ Community members recruited through legal services were directed to a different staff person from the person who had originally recruited them, making the process of transformation from client to leader dependent on the entire organization, rather than on one lawyer.¹¹¹ Some of the founding lawyers ceased acting as lawyers entirely, taking on both the title and work of organizers.¹¹² After seven years of operating as a "collective," staff members decided in 2005 to establish a bounded "legal department" in order to foster accountability and clarity of roles.¹¹³ With strong relationships developed through seven years of shared experience, lawyers in the "legal department" need not stay cabined from either the organizers or the members, and in fact they can often be found participating in organizing meetings, working oneon-one with leaders, walking picket lines, and cooking for parties.¹¹⁴ But it is still made clear that they are lawyers, that their principal job is to do the things that non-lawyers cannot, and that the organization must be able to survive (even with its power reduced) without them.

¹⁰⁹ Interview with Andrew Friedman, *supra* note 79.

¹¹⁰ Interview with Deborah Axt, *supra* note 79.

¹¹¹ Id.

¹¹² Interview with Andrew Friedman, *supra* note 79.

¹¹³ Interview with Deborah Axt, *supra* note 79.

¹¹⁴ Id.

III. CHOOSING AMONG MODELS

These models vary by the level of pre-existing organization required of their client constituency, and by the concrete provisions of accountability of the lawyer to the group. These are familiar concerns whenever lawyers work with groups, and each of the models balances those concerns differently. More importantly, the models also vary in terms of the opportunities for lawyers and group members to develop the kinds of rich, experience-based relationships that Duncan Kennedy has called "intersubjectivity."¹¹⁵ These relationships ultimately provide the opportunity to address the concerns of organization level and accountability directly.

A. Model Selection as Recognition of the Constituency

The horizontal organization of models across this spectrum is partly an expression of the differing needs of constituencies at different stages of organization. For example, the Corporate Model requires a fully formed organization with its own internal mechanisms for translating heterogeneous interests into straightforward directives to the lawyer, as does the private corporation on which it is based. At the other end of the spectrum, the Lawyer-Organizer creates an organization she hopes will hold her accountable. In the middle, lawyers approach constituencies in various stages of organizing and become involved in the organizing process itself. The Scaffold Lawyer is not an organizer, but sparks or nurtures organizing, perhaps by emphasizing the inherent spaces in the formal justice system available for organizing. The Enabling Lawyer and the M*A*S*H Lawyer do not take responsibility for the initiation of an organizing process, but work to support and sustain the already-initiated process.

But it is an oversimplification to suggest that a lawyer simply takes the constituency as she finds it, already laid out in a visible state of organization or disorganization. In fact, all constituencies are at the same time organized and disorganized: the janitors in a high-rise office building are organized—often efficiently—by the contractor who employs them. At the same time, they may be a non-union workforce and therefore not organized around any interests they do not share with their employer-such as wage maximization or workplace dignity. Residents of a neighborhood participate in multiple levels of organization-social life, parish, extended family, landlord-tenant relationships-yet may still have no organization through which they can project their common interests in the political sphere. A lawyer hoping to find a constituency easily identifiable as "organized," "unorganized," or "partially-organized," so that she can pick the matching model, is in for confusion. In reality, lawyers choose the level of organization they are willing to recognize, rather than simply accepting the level of organization they find. Lawyers, like any public actors, must own their own values and decide what their own goals are in seeking to work with others. For this reason, the choice among models above is not merely a technical choice. First, it is a choice of what ends-what constituencies, what policies, what demandstoward which the lawyer wants to work. For a lawyer who is committed to creating profit through the terms of individual employment contracts, the corporation is the only organization that is needed; for a lawyer who values redistributing more economic resources to workers, some kind of collective labor organization may be the critical type of organization.¹¹⁶ Second, the choice to

¹¹⁵ Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law*, 41 MD. L. REV. 563, 567 (1982).

¹¹⁶ See generally Cynthia Mark & Evonne Yang, The Power-One Campaign: Immigrant Worker Empowerment Through Law and Organizing, 36 CLEARINGHOUSE R. 264, 264–65 (2002–2003) ("The Power-One case

recognize or spurn a particular organization (or organizing process) is also a choice of what *means* can be used most powerfully to create social change. As I have argued in Part I, lawyers should seek out and work with organizations and processes that fulfill the criteria of relational organizing, despite the presence or absence of other characteristics of organization.

To further complicate the role of the lawyer, the selection among organizing processes is almost never without confrontation. If the lawyer chooses not to recognize a particular form of organization with which the constituency is engaged, she does not simply operate on a separate, neutral plane of benign non-interference with it. As the organizer Ernesto Cortes has said, "All organizing is disorganizing and reorganizing."¹¹⁷ The organizing process with which the lawyer allies herself will compete for resources, attention, and power with other organizations. Indeed, such confrontation may be deliberate and clear, as in the opposition between company lawyers and lawyers supporting a union organizing effort. It may also be politically messy, such as when lawyers working with the Association for Union Democracy provided support to union members challenging their own union's leadership as unrepresentative of their interests.¹¹⁸ In these cases the models delineated in this Article are still operative. The lawyer's choice to recognize or not to recognize different forms of organization is more visible and more vulnerable to public criticism when the lawyer elects not to work with prominent organizations, but in reality it is no different than when lawyers choose their allies along less confrontational lines. The lawyer's primary relationship is with the leading participants in the organizing process she recognizes.

B. Model Selection as Definition of the Lawyer's Role

These models vary not only by level of prior organization, but also by the lawyer's influence in the core organizing process. Again, the models vary across a continuum from the secure cabining of the lawyer in the Corporate Model, to her complete immersion in the organizing process in the Lawyer-Organizer Model. If the only threats to the integrity of the organizing process were those attached to the lawyer, it would simply be a matter of balancing the value the lawyer can add to any particular part of the organizing process against the lawyer's potentially distorting effect on that process. But to adopt this simplified calculus would be to idealize the organization as much as the impact litigation model idealizes the lawyer. In fact, as the organization itself takes form, there is always the risk that its own internal forces will cause it to depart from the core criteria of relational organizing. Indeed, organization carries dangers, just as lawyers do. Organization by definition means differentiation between people (division of labor and roles, as well as division into "inside" and "outside"), an action that social justice lawyers commonly treat as presumptively unjust. Organizations usually create hierarchies as a way of facilitating action, decision-making, and accountability. But hierarchy is only a tool and can be used to stifle all three of those desirable ends. Negative examples of hierarchy abound in activists' experiences: the union in bed with management; the neighborhood organization committed to keeping out the ethnically different "newcomers;" and the medieval mysteries of

demonstrates how legal services programs, by means as simple as community legal education and administrative advocacy, can contribute to major, long-term gains for our clients when we partner with community organizers and we give immigrant workers the power to voice their demands and fight for themselves.").

¹¹⁷ Ernesto Cortes, Jr., Southwest Regional Director, Industrial Areas Foundation, Presentation to General Assembly of Unitarian Universalist Association (June 28, 2004), *available at* http://archive.uua.org/ga/ga04/0001.html.

¹¹⁸ HERMAN BENSON, REBELS, REFORMERS AND RACKETEERS: HOW INSURGENTS TRANSFORMED THE LABOR MOVEMENT (2004).

academia.

Both lawyering and organizing threaten the goal of connecting the value added by the lawyer to the interests of the constituency. No model can remove this threat simply by the way it structures the lawyer-constituency relationship. Risk is shifted back and forth, trading the danger of the unrepresentative, hierarchical organization for the danger of the unrepresentative, hierarchical lawyer-client relationship as the models move across the spectrum. At one end of the spectrum, the Corporate Model keeps the lawyer in her place, but perhaps over-relies on the organization's structure and leadership, maximizing the danger that they will become unaccountable to their constituency. At the far end, no organizational leadership mediates between the Lawyer-Organizer and the constituency—minimizing the danger of organizational ossification and unaccountability, but lionizing the lawyer and maximizing the danger that her leadership poses to a truly democratic effort. This could be described as a "law of preservation of risk," so that the dangers of unaccountability are irreducible no matter where they are structurally located.

C. Dynamic Relationships Within Models

Indeed, the threat of unaccountability remains as long as both the lawyer and the organizing effort are viewed as static entities. While at the start of the relationship between the two, it may be necessary to treat them as static, once a relationship is formed between a lawyer and a constituency, neither party can help but be changed by it, so that the conditions in which they find each other also change.¹¹⁹ Because of this change, the lawyer-group relationship is not a zero-sum game.

Parties in a working relationship grow dozens of minute checks and balances that allow them to become more closely intertwined without overwhelming each other. Duncan Kennedy has called this kind of complex, experience-based relationship "intersubjectivity," arguing that its presence can disarm some of the elements social change lawyers find destructive in their relationships, such as paternalism.¹²⁰ Jerry Cohen and Cesar Chavez modeled such a process after Cohen's well-intentioned challenge to an anti-union injunction inadvertently pulled the carpet out from under Chavez's planned civil disobedience of the injunction:

So I bop in one day, after going up to the appellate court in Fresno, and say "I've got this writ of prohibition. We're getting our bullhorns back."

"Oh, fuck!" he screams "I can't—"

I said, "Well, Cesar, you know, you better be straight then If you wanted to violate, let me know."

"Well, I didn't think you were going to get your writ."

I said, "Well, it was pretty clear." And I told him how I got the writ. So from

¹¹⁹ Loomer, *supra* note 30 (defining "relational power").

¹²⁰ See Kennedy, supra note 115, at 647.

that point on, it was like, "Okay, I'll *level* with Jerry." You know, so we're on the same page.¹²¹

If they welcome growth through conflict, as Chavez and Cohen did, lawyers and members of a constituent group learn by tangling with each other. They teach each other how to work together. The result is yet another relationship in a mobilized network of relationships.

The relationship between lawyers at Neighborhood Legal Services (NLS) and leaders at ECCO were similarly both contentious and dynamic.¹²² I have described how lawyers and lowincome workers learned to synthesize their somewhat mismatched analyses and frame a common agenda in their campaign against a state-run career center.¹²³ Ross Dolloff, then the Executive Director of NLS, has written candidly of his initial resistance to, and later appreciation of, ECCO's organizing process.¹²⁴ Dolloff describes not only learning to appreciate new points of view, but also developing a new competence necessary to work outside the familiar frameworks Significantly, he developed both intersubjectivity and of direct legal services delivery. competence through long-term relationships with other leaders involved with ECCO. As a nonlawyer staff organizer on the opposite side of the relationship, I experienced a similar learning curve. During my first month working with Ross, I tried to push him to introduce me to NLS's clients, so that I could recruit them for ECCO's organizing campaigns. Ross, constrained by rules of confidentiality for which I had little appreciation, pushed back. In a lengthy meeting several days later, after we had each reflected on the other's position, we more soberly worked out a strategy in which NLS lawyers would host a voluntary meeting for interested clients. During this meeting, the staff lawyers (not including Ross) would guide the discussion; the clients could then decide for themselves whether they wanted to pursue a further relationship with ECCO. By taking the time to develop this process, and by going through the process together, Ross and I developed our relational competence. This competence not only made it easier for us to deliberate together in the future, but also made it less necessary for us to lean on formal structures while doing so. Once we had a better sense of what the other had to say, we no longer sought rules to limit the other's speech.

As should be evident from both of these examples, intersubjectivity can only be developed through shared experience. Such experience will often be contentious, passing through periods of confrontation that test the commitment of all involved, followed by opportunities for reflection and learning. Studies of such successful relationships are invaluable because our own experience is always slow and costly and we cannot yet count on institutions of legal education to provide such experiences for their students.¹²⁵

¹²² Ross Dolloff & Luke Hill, Collaboration with Broad-Based Organizing Projects – The Legal Services Staffer and Organizer Perspectives, MGMT. INFO. EXCHANGE J., Fall 2000, at 3.

- ¹²³ See supra Part II.3 (discussing the lawyer as Political Enabler).
- ¹²⁴ Dolloff & Hill, *supra* note 122, at 3.

¹²⁵ Existing deep studies, in addition to those already cited, include MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960–1973 5 (1993); PENDA HAIR, *Reflections on Community Lawyering: The Struggle for Parcel C, in* LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE 120 (2001) (describing the various roles played by legal services lawyers in a community coalition fighting with redevelopment authorities over land use in Boston's Chinatown); PENDA HAIR, *Seizing a Voice in Democracy: The Mississippi Redistricting Campaign, in* LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE 62 (2001) (describing a campaign in which a coalition of impact litigators worked with the grassroots organization Southern Echo to win a redistricting battle as well as to increase voter participation in the Mississippi Delta);

¹²¹ Gordon, *Law, Lawyers and Labor, supra* note 72, at 16 n.47.

Even ACORN, with its public endorsement of the Corporate Model and extreme wariness of lawyers' distorting potential, privately puts faith in lawyers' capacity to learn: at least one ACORN leader began the training of new lawyers by having them support organizers in the field for up to a month.¹²⁶ As lawyers begin to understand and respect the organizing process—not only to endorse it, but to gain an authentic sense of its rhythms and vulnerabilities—they are introduced to less technical work with leaders and organizers in a relationship structured more by experience than by rules. The lawyer-constituency relationship works insofar as the model is only a cradle. The organization in fact structures a measured pathway that enables the lawyer to engage with all of her value, including that value that cannot be separated from her personhood.

IV. CONCLUSION

The reality of the legal profession today is that the majority of lawyers work for groups. Legal education, firm organization, rules of ethics, and substantive law are structured to facilitate lawyers' support of the most well-organized, powerful groups in society. The challenge, then, for lawyers with a calling to work for social change, is to create structures that facilitate lawyering with and for un- or partially-organized constituencies. Such constituencies have not yet completely developed the mechanisms by which to hold lawyers accountable and lack formal recognition by the law. I have argued that lawyers seeking to work with marginalized groups must be concerned not only with ethical questions of accountability and paternalism, but with maximizing the power available to those groups. In other words, lawyers contribute the greatest value when they work with groups that are in the process of organizing.

With the challenge thus set and bounded, I have outlined five models that facilitate this work. These models respond to different conditions, including the stage of the organizing process, the competencies of the lawyer, and the level of trust between parties. But static models do not adequately describe the dynamic process by which a lawyer and a group of people, once brought into relationship with each other, generate power that neither had before. When Bernard Loomer speaks of "relational power" or "power with," he does not simply mean the aggregation of skills, knowledge, and energy. "Power with" refers not only to "the power to produce . . . an effect," but also the power to "undergo an effect."¹²⁷ It is not only combination, but also transformation. Both the lawyer and the client are changed by each other (if they so allow), so that relational power.

My goal in beginning to set out lawyer-organizing typologies was to provide a vocabulary to help lawyers reflect on the roles in which they find themselves and on the struggle to transform those places. Such reflection is a critical part of "undergoing the effect" of struggle along with people in the process of organizing. This is where the lawyer should be. Though I have used the word "constituency" throughout my argument, I have not meant to suggest that lawyers have constituencies. Lawyers do not have constituencies; leaders have constituencies. Lawyers have relationships with, and responsibilities to, clients. As such, they are like bottles

¹²⁷ Loomer, *supra* note 30.

Richard Klawiter, *¡La Tierra es Nuestra! The Campesino Struggle in El Salvador and a Vision of Community-Based Lawyering*, 42 STAN. L. REV. 1625, 685–86 (1990) (providing a first-person account of the author's experience with the campesino struggle over land rights in El Salvador); Mark & Yang, *supra* note 116 (describing the Power-One Campaign, in which a legal services organization worked with community organizers to give immigrant workers a voice to fight for themselves).

¹²⁶ Quigley, *supra* note 43, at 459–61 (quoting Wade Rathke, founder of ACORN).

with narrow mouths—they cannot swallow the broad entropy of a rainstorm. Rather, they need funnels—relational structures that collect heterogeneous interests into focused, shared movement with which the lawyer can relate. The lawyer supports the organizing process, which in turn structures her role and relationships. It is a cycle, rather than a transfer of power, and therefore relational, sustainable, accountable, and powerful.

Model	Nature of legal work	Relationship to organizing process
Corporate	Transactional	Provides transactional support for maturing organizations
Legal services as M*A*S*H Unit	Direct legal services to individual participants in an organizing effort	Protects participants from backlash and retaliation; frees leaders to concentrate energy on organizing
Lawyer as Political Enabler	Litigation, research, drafting, training	Secures and protects group's right to organize; helps identify goals and issues; provides access to political forums
Organization on the Scaffolding of Litigation	Litigation, negotiation	Provides visible rallying and polarizing points for movements; provides roles and forums for individuals to testify, negotiate and plan; provides structure and timelines as scaffolding for nascent campaigns
Lawyer as Organizer	Direct legal services, training, organizing	Lawyer's own client base becomes the base for organizing; training and legal services serve as recruitment tools

APPENDIX A: FIVE PRACTICE MODELS FOR SOCIAL JUSTICE LAWYERING

Cause Lawyers and Social Movements

Edited by

AUSTIN SARAT

STUART A. SCHEINGOLD

STANFORD LAW AND POLITICS

An imprint of Stanford University Press • Stanford, California 2006

KF 299 . p8 0.38 2006

Stanford University Press Stanford, California © 2006 by the Board of Trustees of the Leland Stanford Junior University. All rights reserved.

No part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying and recording, or in any information storage or retrieval system without the prior written permission of Stanford University Press.

Printed in the United States of America on acid-free, archivalquality paper

Library of Congress Cataloging-in-Publication Data Cause lawyears and social movements / edited by Austin Sarat and Stuart A. Scheingold. p. cm.

Includes bibliographical references and index.

ISBN 0-8047-5360-1 (cloth : alk. paper) – ISBN 0-8047-5361-X (pbk. : alk. paper) 1. Cause lawyers–United States. 2. Social movements–United States. I. Sarat, Austin. II. Scheingold, Stuart A.

KF299.P8C38 2006

344. 73—dc22

2005036242

Original Printing 2006

Last figure below indicates year of this printing: 15 14 13 12 11 10 09 08 07 06

Typeset by TechBooks, New Delhi, in 10/13 Minion

Special discounts for bulk quantities of Stanford Law and Politics are available to corporations, professional associations, and other organizations. For details and discount information, contact the special sales department of Stanford University Press. Tel: (650) 736-1783, Fax: (650) 736-1784 To My Sweet Prince (A.S.) And To Joel Handler and in memory of Gary Bellow—they paved the way (AS and SS)

The Profession, the Grassroots and the Elite

Cause Lawyering for Civil Rights and Freedom in the Direct Action Era

THOMAS HILBINK

As the civil rights movement moved from the courts to the streets in the early 1960s, three types of cause lawyering came into conflict. In the Fall of 1961, attorney Jack Greenberg replaced Thurgood Marshall as director-counsel of the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund, Inc. (known then as the "Inc. Fund"). A veteran of the litigation campaign that culminated in the Brown decision, Greenberg's ascension made the front page of the New York Times (N.A.A.C.P Names a White Counsel 1961). In its profile of this lawyer on the "civil rights frontier," the Times described Greenberg as a man for whom law "is a religion." Wrote the Times (On Civil Rights Frontier: Jack Greenberg 1961), "[H]e once confided that the only place where he really felt he was in a house of religion was when he entered the Supreme Court of the United States." Greenberg's reverent vision of the law was not without its limits-he recognized that law was not the exclusive answer to the problem of racial inequality in America-but he nonetheless believed it possessed God-like powers to change society (Greenberg 1960; Lewis 1960). It was no surprise, then, that Greenberg was personally and institutionally committed to a lawyer-led, court-based campaign for racial equality.

While the Inc. Fund continued its litigation campaign, the direct action phase of the civil rights movement began to spread around the country, meeting with increasingly violent resistance from these bent on maintaining white supremacy. Despite having campaigned in the midst of the lunch counter sitins and entered office months before the start of the Freedom Rides, President Kennedy sought primarily to quiet the flames, seeking assistance from lawyers like Burke Marshall, whom the administration had chosen to head the Civil Rights Division of the Department of Justice. Marshall was chosen, according to Deputy Attorney General Byron White, because, "We thought it would be more interesting to get first-class lawyers who would do the job in a technically proficient way that would be defensible in court – that Southerners would not think of as a vendetta, but as an even-handed application of law" (Navasky 1971: 38). Those they recruited saw their primary duty as keeping the peace and defending the rule of law from attacks on both sides.

The attitude of both types of lawyers was an increasing source of frustration for civil rights activists. By the time of the 1963 March on Washington, Student Nonviolent Coordinating Committee (SNCC) leader John Lewis represented the vanguard of the direct action movement. Nearly a decade after *Brown* and after three years of sit-ins, freedom rides, and voter registration campaigns that were making slow progress and suffering serious casualties, Lewis' faith in the law was evidently shaken. Lewis' draft speech expressed his frustration with those who counseled calm and patience from those seeking immediate change in the South.

This nation is still a place of cheap political leaders who build their careers on immoral compromise and ally themselves with open forms of political, economic, and social exploitation... Mr. Kennedy is trying to take the revolution out of the streets and put it in the courts. Listen, Mr. Kennedy, listen, Mr. Congressman, listen, fellow citizens, the black masses are on the march for jobs and freedom and we must say to the politicians that there won't be a "cooling-off" period (Lewis 1991: 164–65).

Others talked Lewis out of making that speech, but the sentiment was present nonetheless, particularly among the young activists who had ventured into the Deep South in the early 1960s, working with local people who risked their lives defying "southern justice" and demanding equality, dignity, and freedom in the face of lawless, massive resistance to court orders and legislation. Thus, the lawyer on the civil rights frontier, the "first-class," technically proficient lawyer, and the activists skeptical of court-based reform struggled with the place of law and lawyering in the social changes progressing in the United States of the early 1960s.

In his groundbreaking history of the civil rights movement, Aldon Morris (as noted by Michael McCann) contends that in the direct action years, "[t]he two approaches – legal action and mass protest – entered into a turbulent but workable marriage" (Morris 1983: 39 *quoted in* McCann 2004: 512). Although generally true—both approaches to social change were prominently used throughout the 1960s—research demonstrates that those engaged in mass protest at the very least had a long-term affair with a different group of lawyers than those typically seen as *the* lawyers for the movement. These other lawyers' vision of the system, vision of the cause, and approach to lawyering reflected a cognizance

of and sensitivity to the worldview of the direct action wing of the movement. What I argue is that new approaches to cause lawyering emerged as a result of "experiences, circumstances, memories and aspirations of lawyers" involved in the movement (Shamir and Chinski 1998). In the context of the civil rights movement, the experiences gained working with movement activists and the impact of exposure to "southern justice" resulted in the reconstruction of cause lawyering to fit the movement context.

Social Movement Theory has gone a long ways toward better understanding the factors that shape and influence movements for social change. As McCann and Dudas discuss in their contribution to this volume, theorists' focus on political opportunities, political resource mobilization, and frames of collective meaning all help us better to understand the commonalities among diverse movements (McCann and Dudas 2006). One of the key debates in the literature focuses on the role of elites and professionals in steering movements. Responding to McCarthy and Zald's contention that the ascendance of social movements in the 1960s was the result of the spread of professional social movement organizations (SMOs), others have vociferously countered that professionalization of movements moderated movement goals and thus blunted the radical social change aspects of those movements, resulting in less change than might have otherwise occurred (McCarthy and Zald 1973; McCarthy and Zald 1977; Piven and Cloward 1977; Perrow 1979; Helfgot 1981; McAdam 1982; Jenkins 1983; Haines 1984; Jenkins and Eckert 1986; Staggenborg 1988). Anna Maria Marshall, in her chapter from this volume, is correct in asserting, "Professional SMOs, by virtue of both their repeated engagement with political elites and their training as professionals, are much less likely than indigenous protest groups to make broad demands for sweeping change" (Marshall 2006). Yet much less likely does not mean that professional SMOs always had a moderating effect, or sought to. Thus, the critics are partially correct. In the context of the civil rights movement, some professional SMOs acted as moderating forces that attempted to direct the movement away from radical goals while others adopted themselves the radical goals of the "classical SMOs".

What social movement scholars have generally failed to understand is that professionals—at least in the case of lawyering—are not fungible. Not all lawyers approach lawyering the same way, relate to clients alike, have the same attitudes toward law and the legal system, or share the same beliefs about the cause for which they fight. At its most basic level, the study of cause lawyering contained in this volume and its three predecessors demonstrates the extent to which such a view is misguided (Marshall, 6; Jones, 4). This chapter adds further depth to that observation. More importantly, however, the chapter also demonstrates the extent to which the understanding of professional action in the social movement context has failed to understand the ways in which professionals and concepts of professionalism can be and are influenced by social movements. "Where one practices influences how one practices," Marshall succinctly states (Marshall 2006). In other words, theorists who have treated professionals *as* professionals have assumed, to paraphrase Lynn Jones, that lawyers act according to their professional role as lawyers, rather than as activists (Jones 2006). This is decidedly not always the case.

In their earlier contribution to the *Cause Lawyering* enterprise, Ronen Shamir and Sara Chinski rightly recognize that a cause is a "socially constructed concept that evolves, if at all, through a process in the course of which experiences, circumstances, memories, and aspirations are framed in a particular way" (Shamir and Chinski 1998: 231). However, Shamir and Chinski's observation of the nature of a cause can be applied to the concept of cause lawyering as well. Cause lawyering is a socially constructed set of practices and concepts that evolve through a process in which experiences, circumstances, and beliefs shape and reshape how lawyers engage in professional practice. Forms of practice are not static. Lawyers' actions change over time in reaction to forces both internal and external, incorporating personal experience and contextual influence, what Sarat and Scheingold describe as "The mutually constitutive relationship among the social, political, and legal worlds in which cause lawyers operate and which they help construct" (Sarat and Scheingold 2005: 2).

This essay looks specifically at cause lawyering in the context of the direct action phase of the civil rights movement (roughly 1960–65) and the ways that concepts of lawyering reflected and reacted to social and professional experiences, circumstances, and beliefs. Activists and lawyers brought to the movement a set of what I call "visions" and practices that reflected understandings of law, the legal system, and professionalism. Within the crucible of the Deep South, those involved reconsidered their visions of the system in which they worked, their visions of the cause, and visions of the lawyer's role in the movement. For many, the result was a new approach to cause lawyering that challenged contemporary conceptions of practice and professionalism both within and outside the movement. In short, the movement changed the professionals more than the professionals changed the movement.

Over the course of the 1960s, four prominent legal organizations provided assistance to the civil rights movement: the Inc. Fund, the Lawyers Constitutional Defense Committee (LCDC), the National Lawyers Guild's Committee to Assist Southern Lawyers (the Guild), and the Lawyers Committee for Civil Rights Under Law (LCCRUL or the "President's Committee," as it was known).¹ In an earlier essay, I proffered three "types" of cause lawyering that fit under the general rubric of cause lawyering. "Proceduralist," "Elite/Vanguard," and "Grassroots" lawyering can be distinguished, I argue, in looking at the ways in which lawyers conceive of their "visions of the system," "visions of the cause," and "visions of the lawyer's role" (Hilbink 2004). In the case of lawyering within the civil rights movement, each of these types is detectable in the groups mentioned.

At the start of the direct action phase of the movement, the Inc. Fund's approach to lawyering was the most prominent thanks to the fact that it was the most significant national legal organization working in the field. It possessed many of the qualities associated with "elite/vanguard" lawyering. In regards to the "vision of the system," Jack Greenberg's statements in the *New York Times* (discussed above) expressed a reverent attitude toward law and the Supreme Court as an institution—law's majesty inspired faith in the law whereby judges (though, particularly, justices) implicitly gods or oracles. Greenberg believed in (and the Inc. Fund's litigation strategy demonstrated a belief in) law's capacity to "effect larger processes of social change" (Greenberg 1960). The Inc. Fund's approach evinced a set of beliefs common at the time, what Laura Kalman dubs "legal liberalism": a belief that society's ills can be cured through legal action (Kalman 1996: 2).

The Inc. Fund's "vision of the cause" further reflected an "elite/vanguard" approach in its focus on law as the primary means of bringing change. The Inc. Fund believed in the cause of equality and believed law was the best way to achieve that goal. In its 1963 annual report, the Inc. Fund, in the wake of the Birmingham protests, warned of a crisis involving the rule of law caused by both opponents of the movement and the movement itself. The Inc. Fund's solution? "There is only one way. Those who believe that rights must be found in law and ultimately rest upon law must make a massive effort to use law to solve America's race problem" (NAACP-LDF, 1963 (italics in original)). The Inc. Fund focused on obtaining victories on issues of legal principle as the way to advance equality. It had a "grand plan" and fought "over-all issues" but left people saying, "The Inc. Fund may win a great principle but what about us?" as NAACP head Roy Wilkins put it in a letter to the Field Foundation (Wilkins and Jones 1965). From the organization's perspective, the goal was to establish legal principles first and foremost-putting them at odds with activists who saw protest as not merely a way of establishing a principle, but involving people in their own liberation and thus challenging a culture of oppression.

The movement's growing strategic focus on direct action did Civil disobedience had frustrated Thurgood Marshall when he was head of the organization. Dismantling Jim Crow, he said in reaction to the Montgomery Bus Boycott, was "men's work and should not be entrusted to children" (Branch 1988: 189–90; Tushnet 1994: 305). The lunch counter sit-ins were similarly galling to Marshall, as Derrick Bell recalls him yelling about, "crazy colored students" violating the "sacred property rights of white folks" (Williams 1998: 287). The law was clear and best left to the lawyers. The attitude remained the same as the movement grew. The Inc. Fund felt that direct action tactics went too far when, according to attorney Len Holt, a "'point had been proven' and there was no need for new cases before the number of old arrests had tapered down considerably" (Holt 1992: 89). This is not to say that the organization refused legal assistance to those in need, but it did so reluctantly while putting pressure on the movement to change its approach.

The Inc. Fund's willingness to pressure activists to change their approach revealed the groups' ideas about the respective roles of lawyers and activists in advancing the cause. The Inc. Fund lawyers had, according to one historian, a "well-established set of practices, a well-defined set of goals" (Bourne n/a). These goals were defined by lawyers, the practices established by them as well, from the offices in New York. According to Ella Baker, a former NAACP field organizer who later became a guiding force behind SNCC, "The legal strategy 'had to be' directed by lawyers and other professionals, leaving most of the huge mass base...little meaningful role in the development of policy and program except raising funds and cheering the victories as they came" (Payne 1995: 87). Marshall made clear to NAACP head Roy Wilkins that the membership could not set the agenda for the lawyers. He resisted suggestions that he and his staff be more "aggressive" and attack a broader array of racist laws (Williams 1998: 258). Lawyers were to be in control. Jack Greenberg's actions reflected a similar attitude, evidenced by the fact that he felt he could set the terms for its representation of activists going South for Freedom Summer in 1964. Greenberg wrote Freedom Summer director Bob Moses informing him that the Inc. Fund would provide legal assistance on condition that SNCC refused offers of assistance from the National Lawyers' Guild.² SNCC refused this condition, as Moses informed Greenberg:

The SNCC Executive [Committee's] feeling was that the only principled position is to accept the offer of legal assistance from the National Lawyers Guild and urge the different associations of lawyers to lay down, if possible, jurisdictional lines, to insure optimum coverage. In particular, they were concerned about the expressed unwillingness of the Legal Defense Fund to file offensive suits, and a feeling on our part of their lack of commitment to handling "criminal" cases involving our civil rights workers (Moses 1964).

THOMAS HILBINK

Moses' letter suggests that SNCC was bristling not only at the Inc. Fund's attempt to determine from whom SNCC would accept legal assistance, but also that the Fund had been resistant to SNCC's desire to file offensive (as opposed to defensive) suits and was less than enthusiastic about defending activists arrested in the course of protest actions. The Inc. Fund lawyers whom Jenkins and Eckert describe as providing "technical support to the indigenous challenge" were in fact doing much more than that. The Inc. Fund behaved as social movement theorists generally assume professional SMOs do: attempting to moderate the movement and pursuing elite-determined agendas rather than those of the indigenous movement.

In the midst of increasing tension between the Inc. Fund and activists, another group of attorneys threw its hat into the ring that was dedicated not to serving activists, but rather the President and the legal system. In reaction to the violence in Birmingham, Alabama, President Kennedy called together an "elite corps" of the legal profession to enlist them to provide leadership in quelling racial unrest in the American South (Hunter 1963; Connell 2003: 97). In attendance at the White House meeting were three former Attorneys General, law school deans, former American Bar Association (ABA) presidents, and prominent lawyers from cities around the country. The result of the meeting was the creation of a "lawyers' racial communications committee"-the LCCRUL (known as the President's Committee due to its close ties to the Kennedy administration)headed by Philadelphia attorney Bernard Segal, chair of the ABA's federal judicial vetting committee, and Harrison Tweed, chair of the American Law Institute and name partner in upper-crust New York law firm Milbank & Tweed (Hunter 1963). The last two words of the group's name were added at Tweed's insistence to make clear that the group worked within the legal process and would not condone violence (Connell 2003: 85). From its origins, the group represented an example of "proceduralist" cause lawyering (Hilbink 2004: 665-73).

Emerging as it did from the Kennedy Administration and the "elite corps" of the profession, the Committee evinced proceduralist cause lawyering's strong, primary dedication to (and belief in) the legal system itself (Connell 2003: 97). Journalist Victor Navasky described the Kennedy Justice Department as hewing to the "Code of the Ivy League Gentlemen" reflecting a vision of the world that assumed the system "which had floated them to the top was basically sound, that the main problem was to gain for the Negro admission to that system and that the way to achieve this goal was to think and behave like a lawyer, and a corporation lawyer at that" (Navasky 1971: 164). The code understood the system as formed by discreet, individual matters—case-by-case, person-by-person—unconnected to a larger sociopolitical context. The leaders of the President's Committee Shared this vision.

The Committee expressed an abiding faith in legal process and envisioned the cause as defending that process against attacks by any group. In one article, Tweed, Segal, and Professor Herbert Packer critically responded to Martin Luther King's "Letter from Birmingham Jail," urging that the solution to the "civil-rights problem" lay not in civil disobedience but,

by reliance upon the administration of the law through due process in the courts and fair enforcement by the appropriate authorities. Thus the spectacle of repeated violations of law, actual or apparent, by those who are pressing the fight for civil rights is deeply troubling to many thoughtful persons who reject the notion that the ends justifies the means... (Tweed, Segal, and Packer 1969: 90).

Yale Law School Dean Eugene Rostow, another force behind the creation of the group, in a letter to the Kennedy Administration, spoke of concerns that "Massive parades in the streets, however disciplined, carry the risk of violence and mob action," and that the Birmingham campaign, "smacks of government by mob-demonstration" (Rostow 1963b). Government belonged in the legislative halls, the courtrooms, and the executive branch, he implied, assuming that the system was basically sound and ignoring the fact that in the South, as in Washington government was whites only.³

The group was dedicated to defending the legal system and upholding the duties of the profession. Their cause: to uphold the rule of law and to urge the legal profession to provide counsel to those who needed it. As stewards of the profession, they vowed to "speak out against irresponsible criticism of courts and the judicial process, urge adherence to the rule of law..." (LCCRUL 1964). They would urge parties on both sides to abide court orders (Unsigned 1963). The lawyers also aimed to fulfill a professional duty to provide representation to those needing it. From the Committee's perspective it did not matter who provided such representation; even if a lawyer did not support the cause it was their duty to defend their client. To that end, the Committee began reaching out to its bar association brethren in the Deep South, encouraging attorneys to live up to their professional duties and represent individuals arrested in the course of civil rights actions—something virtually no white lawyers in those states had been willing to do up until then.

From the beginning the President's Committee refused to take a position on the civil rights cause. In an open letter to George Wallace regarding his refusal to follow court orders requiring the integration of the University of Alabama,

the lawyers who would soon form the President's Committee urged the Governor to submit to the rule of law. From their perspective, the lawyer's duty in such a situation when the courts have made clear their ruling is to urge client and community to honor the decision that has been reached, they wrote (Unsigned 1963). One sentence scratched out of the draft letter sent to signatories is telling: "As members of the bar, as officers of the law, we pledge ourselves to support the civil rights of all citizens, regardless of race or color, to the full extent of the law" (Unsigned 1963). Even such neutral language was too much. They believed supporting civil rights-even when required by law-was too controversial. They were mediators, negotiators, and communicators, not civil rights activists, reflecting the attitude expressed in the sign on the desk of Civil Rights Division head Burke Marshall: "Blessed are the peacemakers, for they shall catch hell from both sides" (Burns 1970; Navasky 1971: 177). When Committee historian Ann Garity Connell asked founding members if they thought of themselves as civil rights lawyers, "The universal response was no" (Connell 2003: 88 n.3).

The President's Committee's vision of the role of the lawyer was similarly proceduralist. The group first undertook direct representation of a movement client in late 1963, when Jack Pratt, counsel to the National Council of Churches' (NCC's) Commission on Religion and Race approached the NCC's attorney, Robert Knight of Shearman and Sterling, in search of legal representation for a group of ministers going South to work with the movement. Knight, a member of the President's Committee, got reluctant Committee approval and sent along a young associate, Robert Lunney. The representation followed the parameters of traditional lawyer-client relationships: the client in need of help approached the attorney and a representation agreement was drafted. Reflecting the Committee's concern with its cause-the rule of law-in exchange for representation the ministers agreed not to violate a Mississippi state court injunction barring racial demonstrations, agreeing instead to allow lawyers to test it in the courts. The relationship between attorneys and clients reflected the Committee leaders' notion that there existed "bounds within which the struggle for civil rights may legitimately proceed" (Tweed, Segal, and Packer 1969: 97).

Robert Lunney described his duty while in the South as mediating between "the leadership of the demonstration and the powers that be in the village or city to avoid as much as I could any violence where people could get hurt, because my sense of what was going on was they certainly had rights and privileges that had to be exercised and the powers that be, so to speak, had to recognize that" (Lunney 1992). Lunney saw himself as a clean-cut, reasonable alternative to the civil rights workers who could be "vociferous" and "dressed in a fairly scruffy manner and didn't necessarily deal with the powers that be in a more moderate way" (Lunney 1992). According to Connell, Lunney "went to Mississippi as a representative of the legal establishment... from a major New York firm. His role... was a conventional one, legal counsel. He did not represent any social agenda for change" (Connell 2003: 120).

As plans coalesced for the 1964 Freedom Summer, Jack Pratt of the NCC attended a meeting in the office of Washington lawyer and President's Committee member Lloyd Cutler. According to Pratt the meeting included representatives of many "establishment groups who were active in the South and out of it came the conclusion that thousands of white college students would be coming in from the north in a summer education project and then the question became what should be the role of the establishment" (Pratt 1992).

The President's Committee sought to assure the project conformed to the rule of law. Although continuing to lobby the Mississippi Bar to provide legal counsel to those arrested in civil rights actions, the group also sought lawyers who could provide "objective" legal assistance without succumbing to the "emotionally-charged atmosphere of Freedom Summer" (Unsigned 1964). Lawyers who agreed to spend time in the South were to offer legal counsel to the ministers from the NCC and "where specifically requested to do so, and where possible under the local rules and procedures," offer actual representation. They were to represent individuals, not members of a movement (Hammer 1966: 83). One of the stated goals was to advise the ministers and students working with them "on their rights and responsibilities so as to prevent breaches of valid state and local laws and ordinances" regardless of whether such breaches might be an integral part of strategies for change (Bernhard and Doyle 1964). Pratt was giving up on the President's Committee's ability to provide unfettered legal assistance of the type the movement demanded. LCCRUL acted as a professional SMO is presumed to act: substituting its goals for those of the movement, attempting to deradicalize movement actions. Yet the classical SMOs coordinating the fight in Mississippi-primarily SNCC and CORE (Congress of Racial Equality)-were philosophically opposed to such elite control.

Beginning in the early 1960s, SNCC and CORE activists had begun to bristle at the Inc. Fund's cautious and controlled top-down model that was showing too few results too slowly. Furthermore, they did not hold the reverence for law and the legal system that the lawyers at the Inc. Fund or LCCRUL held. Law spoke in terms of "all deliberate speed." Their strategy—forged in the sit-in movement of 1960 that quickly spread across the nation—differed distinctly. "Freedom Now!" was increasingly the dominant slogan of the movement. As Howard Zinn observed at the time, "What had been an orderly, inch-by-inch advance via legal

THOMAS HILBINK

processes now became a revolution in which unarmed regiments marched from one objective to another with bewildering speed" (Zinn 2002: 26).

Reliance on the law, some believed, had proven ineffective in confronting a Southern white supremacist society where the rule of law enjoyed few adherents (Dittmer 1986: 72). The Field Foundation's 1961 report on the Inc. Fund noted that many at the NAACP's annual conference believed the lawyers were "moving too cautiously" (Field 1961). Mississippi activist Amzie Moore encouraged SNCC workers to begin organizing in his state because he was tired of going through legal procedures he had endured for years to no avail (Payne 1995: 105).

Others observed that beyond simple frustration with the legal approach, direct action demonstrated a shift in the nature of the cause. Journalist Ralph McGill noted in the *Atlanta Journal-Constitution* that "The sit-ins were, without question, productive of the most change.... No argument in a court of law could have dramatized the immorality and irrationality of such a custom as did the sit-ins.... Not even the Supreme Court decisions on the schools in 1954 had done this.... The central moral problem was enlarged" (Zinn 2002: 28). The activists had transformed the cause from a legal battle to a moral battle, and because law and morality were not the same, lawyers qua lawyers had no special expertise.

Further driving the move to direct action was the organizing philosophy ascendant in SNCC and CORE that rejected top-down, elite leadership. Instead, activists enacted the "radical democratic vision" of SNCC guru Ella Baker who, according to historian Barbara Ransby, understood that

laws, structures and institutions had to change in order to correct injustice and oppression, but part of the process had to involve oppressed people, ordinary people, infusing new meanings into the concept of democracy and finding their own individual and collective power to determine their lives and shape the direction of history (Ransby 2003: 1).

Others adopted the philosophy preached at the influential Highlander Folk School that rejected a movement wherein the leadership told people what to do and provided the thinking for them (Payne 1995: 71). With such a philosophy, the top-down, lawyer-led approach of the Inc. Fund was understandably out of favor. The point of protest and organizing was not necessarily aimed at testing law, but rather sought to get people to challenge authorities directly, to put their own bodies on the line and secure their own liberation. Arguments in federal courts were too far removed and mediated to provide such an experience. As attorney Len Holt described SNCC's approach, the group was dedicated to attacking "again, again," the manifestations of Southern racism (Holt 1992: 89). The Inc. Fund either lacked the inclination or the means to back them up in such endeavors (Greenberg 1994: 353). Yet, not all members of the legal profession showed the inclination toward leadership and control manifested by the Inc. Fund and LCCRUL. These lawyers reflected a "grassroots" approach to lawyering.

Civil rights organizers bristled at the Inc. Fund's approach and questioned whether lawyers should head the movement, but did not altogether refuse a place for law and lawyering in social change. Activists gave an enthusiastic reception to those who adopted an approach to lawyering that resembled the movement's radical democratic philosophy. When National Lawyers Guild attorneys began meeting with SNCC workers in the South, discussing the possibility of collaboration between the movement and lawyers, taking activists' ideas for legal action seriously and allowing for the possibility of litigation strategies coordinated with and determined by activists rather than lawyers, the reaction was overwhelming. "Why aren't the NAACP lawyers like you guys?" one SNCC worker reportedly asked (Holt 1992: 89).

Since its inception the National Lawyers Guild had balanced its identity as both a bar association and an advocacy group. Its founding constitution made explicit reference to law as a political system and its belief in human rights, stating its aim to unite lawyers "in a professional organization which shall function as an effective social force in service of the people to the end that human rights should be regarded as more sacred than property rights" (Auerbach 1976, Ch. 7; Ginger and Tobin 1988: 11). Furthermore, it was founded as an integrated organization in considered opposition to the ABA's whites-only policy. Thus, its early involvement in civil rights work is hardly surprising. Guild lawyers began aggressively volunteering help to the various civil rights groups, sending volunteers South on an ad hoc basis (Meier and Rudwick 1975: 270).

Organizations like the American Civil Liberties Union (which had adopted the same top-down, lawyer-led approach as the Inc. Fund but was now led by a brash young legal director named Mel Wulf) did the same, sending New York attorney William Kunstler, a board member whose practice lay primarily in the field of corporate law, to represent Freedom Riders (Langum 1999: 47). Kunstler's vision of the legal system was quickly altered by his experience in the South. He recalled in his memoirs: "In the past, lawyers, myself included, viewed the law as sacred and inviolate. But movement law considered the legal system as something to be used or changed, in order to gain the political objectives of the clients in a particular case" (Kunstler 1994: 105).

"Movement law's" vision—that law was not sacrosanct, but simply another tool for achieving political goals—was increasingly influential, reshaping concepts of lawyering for some, and attracting others who already shared some form of the vision. Carl Rachlin, the legal director for CORE understood his work in moral, rather than legal or constitutional terms: "What we had then was a moral understanding that what we were doing was totally right..." (Rachlin 1992). The goal was not to win a legal victory, but to transform southern society.

"Grassroots" lawyers understood that the movement's tactics went beyond simply changing the law, and thus the role of lawyers in the movement required a less litigation-centered approach. The Inc. Fund's modus operandi would not serve the movement, as Rachlin realized.

I made the decision that it wouldn't work because the NAACP was, as able as it was – and this was in no way to minimize the quality of work they had done – I didn't feel it was capable at that moment in its history of dealing with people in motion. The NAACP had very brilliantly set up a series of activities leading to fine victories in the courts, but they were based upon a program that the NAACP designed (Rachlin: 1992).

The Inc. Fund's model assumed people functioned in a certain way, but CORE (and SNCC) had people "in motion all of the time." Thus, Rachlin believed a new organization of lawyers was needed that would better fit with the activists' approach.⁴ "I would not in any way tell people how to behave and I thought that's what the NAACP with all its ability might tend to do. I didn't want in any way to interfere with the spontaneity of the activities that CORE people were engaging in at that time" (Rachlin 1992). Rachlin found other attorneys who agreed with his understanding of movement needs—attorneys who had independently come to the same conclusion. Jack Pratt from the NCC who was exasperated by the President's Committee's moral timidity, and Mel Wulf who due to a strong dose of professional competition was worried that the National Lawyers' Guild's program in the South would make him and his organization look less than committed to the civil rights cause (Pratt 1992; Wulf 1992).

Grassroots lawyering was different from the elite/vanguard or proceduralist forms of practice. Lawyers for the Guild sought to be "responsive, unaloof, and 'regular,'" seeming to know "*where it was at*" (Holt 1992: 89) (emphasis in original). LCDC expected its lawyers to reject the special status and treatment attorneys often expected, instructing its volunteers, "We try to balance the obligation to function effectively as lawyers with the need not to have too great a gulf between our conditions of life and those of the people whose rights and dignity we are committed to serve" (Unsigned 1965). Lawyers acted as collaborators rather than directors, even in the realm of litigation (Holt 1992: 89). Thus LCDC's founders envisioned coordinating with protesters in *advance* of an action to keep people out of jail and out of court through prospective, offensive legal actions—seeking injunctions to prevent arrests, for instance—rather than purely uncoordinated, reactive, defensive legal representation (Kinoy 1983: 191–200).

Under no circumstances were lawyers to direct the movement. In its instructions to attorneys heading South, LCDC made this explicit:

The volunteer civil-rights lawyer is not a leader of the civil-rights movement. We are there to help the movement with legal counsel and representation, not to tell the movement what it should do. You may, if asked, suggest what the legal consequences of a course of action might be, but you may not tell them whether or not they should embark on it. They have more experience than you at civil-rights work in the South, and they are responsible for the action program. Even if they make mistakes, they are theirs to make; your task is to defend their every constitutional and legal right as resourcefully and committedly as you can, even if they have made a mistake. Until the time comes when they ask us to lead the movement, do not be misled by any advantage of education, worldly experience, legal knowledge, or even common sense, into thinking that your function is to tell them what they should do. The one thing that the Negro leadership in the South is rightly disinclined to accept is white people telling them any further what to do and what not to do, even well-meaning and committed white, liberal Northerners (Unsigned 1965; Wulf 1992).

Succinctly, Guild program director George Crockett wrote, "In the war against injustice in Mississippi, lawyers are not the front line troops" (NLG 1964). Kunstler understood lawyers were "not the heart [of the movement] but merely an appendage." "Marching and protesting, being out on the streets – that was where the strength of the movement lay, and that would be how it would finally prevail" (Kunstler 1994: 105, 126). Lawyers were nonetheless a part of the movement. They were activists, as well.

LCDC's founders had a sense of the role of lawyers within the movement, yet this did not necessarily mean the attorneys they recruited shared that understanding. Lawyers for every group that sent lawyers South in the summer of 1964 came from different places, different professional situations, and possessed different understandings of why they were going. Some went to uphold the rule of law, others to advance the movement cause. Others went because it sounded like a fun (or sexy or dangerous) escape from daily legal drudgery. Regardless, the experience of lawyering in the South had a significant impact on many (if not most) of the attorneys, forcing them to reenvision the legal system, the cause, and the role of lawyers within the cause.

Although one magazine certainly exaggerated when it wrote that the policies set by LCDC and the President's Committee were ignored by the lawyers once they arrived South, the experience of the summer challenged the conceptions of lawyering laid out by the group's leaders (Hammer 1966: 83). Lawyers for the President's Committee spent most of their time that summer visiting with members of the local bar around the state of Mississippi, attempting to persuade them to represent people in need of counsel, as required by the *Canons of Professional Ethics* and as promised by the state bar's resolution affirming "its stand and the time-honored traditions of the Bar" to provide legal assistance to all in need, regardless of cause (Bernhard and Doyle 1964).

LCCRUL volunteers reported meetings with some "rational segregationists" as well as others who questioned the very suggestion that Mississippi had a race problem (O'Connell and Bryan 1964). By summer's end, LCCRUL lawyers expressed frustration with such efforts, reporting to the Committee office that no progress could be made through the existing power structure. They were abandoning the proceduralist ideal of neutral representation. Another labeled the bar resolution a meaningless "perversion" (Hopkins 1964). The assumption that the system was "essentially sound" did not stand up to their experiences.

When they were engaged in legal work, the lawyers for the President's Committee were similarly frustrated, bucking at the restrictions requiring them to represent only ministers. President's Committee lawyers were left idle much of the time because ministers were but a small portion of the activists in the state and (as one lawyer sarcastically reported) were not conveniently arrested at evenly spaced intervals. The President's Committee's lawyers were forced to remain idle while "travesties on the legal process were being committed on others than ministers" (Stone 1964). The Committee's rules did not conform to the reality of the situation in Mississippi, particularly in distinguishing between members of the movement. The President's Committee board may have been concerned about maintaining nonpartisanship or some semblance of a traditional lawyer-client relationship, but many of its emissaries began to see their duty differently. They were not representing individuals, but rather the movement (Sullivan 1964). In other words, LCCRUL volunteers increasingly strained against the proceduralist orientation espoused by the Committee's leadership. What the board decided in its meetings in DC and New York did not conform to what lawyers saw on the ground in the Deep South. LCCRUL sent lawyers down to fight for the cause of the rule of law, but many volunteers came to share the movement's vision of their cause.

As a result, some ignored their agreement with the President's Committee and represented nonministers. Others ignored organizational rules barring collaboration with other groups and donated their spare time to LCDC (O'Connell and Bryan 1964; Stone 1964). At summer's end many emphatically urged the President's Committee to reconsider the "absurd limitation on our jurisdiction." Wrote attorney Bob Ostrow, in an angry missive, "As soldiers in the 'Third Revolution' as someone has categorized it, we must take any and all cases, work with anyone and everyone, deny no one our talents..." (Ostrow 1964; Sullivan 1964). Such battles between attorneys and LCCRUL leadership continued well after the organization established a permanent office in Jackson, MS. Staff attorneys increasingly identified as movement lawyers, while group leaders pushed them to remain nonpartisan mediators, unaffiliated with the civil rights cause (though by 1965 the restriction on representation was lifted).

LCDC attorneys did not suffer from idleness. The summer saw over 1,000 arrests alone and a typical day involved investigations into a church bombing and a separate incident involving the beating of two summer workers, the release of fifteen workers from jail, the arrests of three men accused of looking at a white girl, and the harassment of a voter registration worker (MSP 1964). When arrests did happen, LCDC (and LCCRUL) lawyers often relied on a controversial legal strategy: removal. Using a Reconstruction-era law, lawyers were able to petition to take cases out of state and local courts and into federal courts if they believed that the defendants would not be assured fair treatment at the local level or if the case against them involved a violation of their civil rights (Amsterdam 1965: 2–15). Once the petition was filed the federal judge had to grant habeas corpus, getting activists out of jail and back on the streets within twenty-four hours.

In addition to keeping activists in motion, the technique also threw state prosecutors for a loop. It created in the legal arena a protest technique with many similarities to direct action attempts to fill the jails or stop the functioning of voter registrar's offices. As one summer volunteer recalled, "The intention was to make the point in the federal courts that you couldn't get a fair trial in the state courts and to absolutely clog their dockets" (Weisman 1992). Removal did not resolve the cases themselves (and thus the controversy from the perspective of the Inc. Fund (Greenberg 1992)), but LCDC lawyers were not particularly concerned with such legal victories. They were also looking to the movement's immediate needs: keeping people out of jail was the priority, both for protection—given the fate of Goodman, Schwerner, and Chaney—and for organizing reasons.

Such "fireman" work—as LCDC Executive Secretary Henry Schwarzschild called it—exposed lawyers to "southern justice" and to the movement in ways they had not known before. Local judges (or justices of the peace) ignored basic due process guarantees, convicting defendants in less than thirty seconds (Gutman 1965: 82). Others flagrantly rejected the US Constitution and the Supreme Court, pointing to "local customs" that required segregated

74

courtrooms (Schulman 1965: 111). Others experienced firsthand the violence of southern law enforcement. Henry Aronson, an attorney for the Aetna insurance company, was exposed to such brutality on his first day in the South when Jim Clark, the infamous sheriff of Dallas County, Alabama, threw Aronson down a flight of stairs after Aronson served him with notice of a pending lawsuit. "Violence wasn't beyond them. That had a large effect on me," Aronson recalled (Aronson 1992).

The discrimination meted out by legal actors in Mississippi brought one LCDC volunteer to comment that "the state stood as a working example of totalitarianism in the United States" (Tonachel 1964). President's Committee attorneys were similarly impressed by their interactions. Mississippi law offended "the basic instincts of a lawyer," wrote one (Wing 1964). Bob Ostrow wrote bluntly, "There is *no* law in Mississippi" (Ostrow 1964).

Their experiences with violence and lawlessness left one impression on attorneys; work with the movement left another. George Crockett of the Lawyers' Guild wrote that "The individual lawyer who worked in Mississippi alongside the movement almost invariably expressed profound changes in his own outlook and understanding. He had experienced a new set of legal values, a different system of legal practice and a strange, uncomfortable set of human relations. His personal beliefs were obviously and deeply affected" (NLG 1964).

Some were struck by their encounters with the movement workers. Bruce Sullivan of the President's Committee was impressed that the young people running the campaign in Mississippi had a "general high level of ability." Bob Ostrow balanced the horrors of Mississippi injustice with his experiences "meeting, talking to, and learning from," movement members. Al Bronstein, an LCDC volunteer described attending a mass meeting in St. Augustine, Florida as "one of the most beautiful, exciting, moving, emotional moments of my life." Many letters concur that while lawyers went South with the belief that they were representing individuals in a traditional way, by the time they returned they knew that they were defenders of a movement (Stone 1964).

This was perhaps the most significant change, particularly for the President's Committee volunteers. One volunteer wrote that the "most important lesson" was:

the need of a lawyers participating with the civil rights group to become identified in the minds of the young civil rights workers, with their objectives in the project.... The attorneys who go down there to participate... must be impressed with the need for demonstrating their enthusiasm for the cause, because their restraining counsel is not likely to be considered by the young workers in the absence of personal confidence in the attorney (Sullivan 1964). Thus it was not surprising that Bob Ostrow was described (derisively) by one of his President's Committee peers as having "gone SNCC" early in his time in Missisippi. George Crockett of the Guild noted a similar phenomenon among his volunteers: "By mid-week they wanted to be just as militant as the COFO (Council of Federated Organizations) workers and take part themselves in voter registration work" (NLG 1964).

An LCDC volunteer now understood that "grass-roots, everyday legal representation for Negroes is an essential element in the freedom struggle in Mississippi" (Tonachel 1964: 19). Harvard Law Professor Mark deWolfe Howe (who went to Mississippi with LCDC in 1965), in the preface to a collection of essays by lawyers involved in the movement that summer, wrote, "It may be that in existing circumstances the lawyer who finds himself professionally engaged in 'the movement' must see his responsibility as different, almost in kind, from what it has been in other times and other settings. If he is to be true to his profession he must, perhaps, see himself as engaged not by a client but by a cause..." (Howe 1965: vii). Professionalism now called for a different conception of lawyering.

At the close of Freedom Summer, eighteen lawyers had gone South with the President's Committee. The Guild sent close to sixty and LCDC approximately 115 (Holt 1992: 275-80). Regardless of organization, lawyers seemed to see their value not in terms of legal victories won or representation provided. Rather, lawyers saw their presence as the value. Their presence-in the streets, in COFO Freedom Houses, in jails, in courtrooms-played a role in deterring white Southerners, and particularly state actors, from meting out greater violence and lawlessness against the movement (Freirichs 1964; NLG 1964; Stone 1964). The President's Committee report on the summer project characterized this as a "federal presence" that restrained whites (Bernhard and Doyle 1964; Nevas 1964). Lawyers provided an important morale boost for the movement, showing them that someone was looking out for them (Bernhard and Doyle 1964; Nevas 1964; NLG 1964; Sullivan 1964). They were part of the process of helping people find "their own individual and collective power to determine their lives" (Ransby 2003), helping the movement with their technical abilities rather than telling the movement how to proceed.

None of this is to say that lawyers emerged from the summer having had identical experiences or with uniform notions of what they did and why, as demonstrated in sources such as the writings of lawyers in *Southern Justice* or the reports of President's Committee volunteers. Some seemed to finish their time in the South with many important views and ideas unchanged.⁵ Some continued to believe in the professional mission of the President's Committee. Others continued to have faith that the Federal courts were the mechanism best

suited to achieve the goal of equality. The available evidence only allows for generalizations. By and large they emerged skeptical of the value of law and litigation, yet with few exceptions remained confident that law, lawyering, and the legal system had a place in the civil rights cause. In this sense they were much like the activists they represented who were simultaneously cynical and optimistic about those things.

What is evident is the existence of a gulf between the visions of the Northern leaders of these organizations and what the volunteers believed after encountering and grappling with the reality of the Southern white supremacy. It is important to distinguish between organizational goals and the actions taken on the ground. It was a long way from Washington and New York to Jackson, MS, and even further to such hamlets as Clarksdale or Philadelphia. The visions of law and professionalism espoused by organization leaders did not necessarily translate into such on the ground in the Deep South.

The experiences of lawyers in the Deep South demonstrated, at their most basic, that not all lawyering was the same. Lawyers were able to distinguish between mainstream practices and cause lawyering practices. Activists recognized distinctions between lawyering approaches that put lawyers in charge and those that helped the movement take the course activists wished. The historical record reveals professionals discussing their work with movement activists, and their visions of the legal system and the cause in starkly different terms. Although professional SMOs may have often exerted a moderating influence on the movement, not all such groups did so. As the example of lawyering in the civil rights movement suggests, the relationship between movements and professional SMOs was at times far more reciprocal-with the movement influencing lawyering as much (if not more) than lawyering influenced the movement. In the case of Freedom Summer, it seems that lawyers actually made protest more possible as a tactic-for legal actors prevented arrests or lessened the impact of those arrests, keeping people on the streets to organize, register, and march.

At the apex of civil rights movement activism—between 1963 and 1966—it was the movement that was exerting greater influence on the actions and views of legal professionals involved in the movement rather than professionals who were on the direction of the movement. Many lawyers came with either their own understandings of lawyering, or with the strictures of the organization that sent them. However, in case after case, interaction with the movement and exposure to the realities of Southern justice and violence changed their understandings of their professional and personal role in the movement. Nonprofessionals challenged and redefined professionalsim in the Lawyering context (a concept that is not uniform in its definition) in ways that the social movement literature must take into account.

Notes

1. These groups supplemented the small number of African American attorneys practicing in Deep South states-in Mississippi there were only three black attorneys admitted to practice in 1964-as well as the smaller number of white attorneys willing to take on cases with civil rights undertones. Chestnut, J. L. and J. Cass (1990). Black in Selma. New York: Farrar, Straus, and Giroux; Greenberg, J. (1994). Crusaders in the Courts. New York: Basic Books; Porter, A. (1998). "Norris, Schmidt, Green, Harris, Higginbotham and Associates: The Sociolegal Import of Philadelphia Cause Lawyers." Cause Lawyering: Political Commitments and Professional Responsibilities. A. Sarat and S. Scheingold. New York: Oxford University Press, pp. 151-80. In this essay, due to the constraints of archival resources, I focus little attention on the National Lawyers Guild and its significant contribution to lawyering in the civil rights movement. I also do not touch on the Law Students Civil Rights Research Council, another group mentioned as part of the professionalization of the movement, Jenkins, J. C. and C. M. Eckert (1986). "Channeling Black Insurgency: Elite Patronage and Professional Social Movement Organizations in the Development of the Black Movement." American Sociological Review, 51(Dec.): 812-29. That group has been well covered by Amy Ruth Tobol's history of the group, Tobol, A. R. (1999). "Badge of Honor: The Law Students Civil Rights Research Council." Ph.D. dissertation, Buffalo, SUNY-Buffalo.

2. Greenberg saw the Guild as politically dangerous (as its reputation as a communist-front group could cause problems that would distract from the movement's goals) and both technically and strategically sloppy (Greenberg 1992).

3. Note, however, that Rostow did say in another letter, "We have left this problem to the judges much too long" (Rostow 1963a).

4. Rachlin: 1992 Rachlin was unwilling to associate with the Guild because of the Guild's perceived links to the Communist party (Rachlin 1992).

5. In addition to the report filed by President's Committee volunteers Bryan and O'Connell, another by Morton Klevan reiterates over and over that the Committee is a "conservative" organization dedicated to upholding "law and order" (Klevan 1964).

Bibliographical Note

Archival sources were a major resource in the construction of this paper. The following archives are indicated in the entries below:

Field Foundation Papers, Center for American History, University of Texas

LCCRUL Papers, Wesleyan University Library, Special Collections and Archives, Middletown, CT Pierre Tonachel Papers, on file with author

Ralph Bunche Oral History Collection, Moorland-Springarn Library, Howard University Richard Frank Papers, on file with author

Thomas Hilbink Interviews, tapes on file at Columbia Oral History Research Office; Transcripts available from author.

References

Amsterdam, A. G. (1965). "Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial." University of Pennsylvania Law Review, 113(6): 793–912.

Aronson, H. (1992). Interview by Thomas Hilbink, November 9, 1992.

- Auerbach, J. S. (1976). Unequal Justice: Lawyers and Social Change in Modern America. New York: Oxford University Press.
- Bernhard, B. and J. Doyle (1964). Report on the Mississippi Summer Project, October 20, 1964, Civil Rights—Executive Committee Meetings (1963–67) File, Box 27, LCCRUL Papers (emphasis added).
- Bourne, C. (n/a). History of the Field Foundation, Field Foundation Papers.
- Branch, T. (1988). Parting the Waters: America in the King Years, 1954–1963. New York: Simon and Schuster.
- Burns, W. H. (1970). W. Haywood Burns, Interview by Robert Wright, August 19, 1970, transcript, Bunche Oral History Collection.
- Chestnut, J. L. and J. Cass (1990). Black in Selma. New York: Farrar, Straus, and Giroux.
- Connell, A. G. (2003). The Lawyers' Committee for Civil Rights Under Law: The Making of a Public Interest Group. Washington, DC: Lawyers' Committee for Civil Rights Under Law.
- Dittmer, J. (1986). "The Politics of the Mississippi Movement." In *The Civil Rights Movement in America*, C. W. Eagles, ed. Jackson, MS: University Press of Mississippi, pp. 65–93.
- Field Foundation (Field) (1961). Request for Renewal of Grant-in-aid for NAACP Legal Defense Fund, Spring 1961, NAACP Legal Defense and Education Fund, Inc. S.A. 61 File, Box 2T69, Field Foundation Papers.
- Freirichs, C. A. (1964). Letter to Lawyers Constitutional Defense Committee, September 1, 1964, Pierre Tonachel Papers.
- Ginger, A. F. and E. M. Tobin, eds. (1988). The National Lawyers Guild: From Roosevelt through Reagan. Philadelphia: Temple University Press.
- Greenberg, J. (1960). Race Relations and American Law. New York: Columbia University Press.
- ------. (1992). Interview by Thomas M. Hilbink, October 15, 1992.
- _____. (1994). Crusaders in the Courts. New York: Basic Books.
- Gutman, J. S. (1965). "Oktibbeha County, Mississippi." In Southern Justice, L. Friedman, ed. New York: Pantheon, pp. 80–87.
- Haines, H. (1984). "Black Radicalization and the Funding of Civil Rights." Social Problems, 32: 31–43.

Hammer, R. (1966). "Yankee Lawyers in Mississippi Courts." *Harper's*, (November): 79–88.

Helfgot, J. (1981). Professional Reforming. Lexington, MA: Lexington Books.

- Hilbink, T. M. (2004). "You Know the Type Categories of Cause Lawyering." Law and Social Inquiry, 29(Summer): 657–98.
- Holt, L. (1992). The Summer That Didn't End. New York: Da Capo Press.
- Hopkins, S. (1964). Letter to Berl Bernhard, October 4, 1964, Mississippi Summer Project 1964—Reports File, Box 40, LCCRUL Papers.
- Howe, M. D. (1965). "Our Splendid Bauble." In *Southern Justice*, L. Friedman, ed. New York: Pantheon, pp. v–ix.
- Hunter, M. (1963). "Lawyers Promise Kennedy Aid in Easing Race Unrest: Leaders of the Lawyers Committee." *New York Times*, June 22: 1.
- Jenkins, J. C. (1983). "Resource Mobilization Theory and the Study of Social Movements." Annual Review of Sociology, 9: 527–53.
- Jenkins, J. C. and C. M. Eckert (1986). "Channeling Black Insurgency: Elite Patronage and Professional Social Movement Organizations in the Development of the Black Movement." *American Sociological Review*, 51: 812–29.
- Jones, L. (2006). "The Haves Come Out Ahead: How Cause Lawyers Frame the Legal System for Movements." In *Cause Lawyers*, vol. IV, A. Sarat and S. Scheingold, eds. Palo Alto, CA: Stanford University Press, pp. xxx.
- Kalman, L. (1996). The Strange Career of Legal Liberalism. New Haven, CT: Yale University Press.
- Kinoy, A. (1983). *Rights on Trial: the odyssey of a people's lawyer*. Cambridge, MA: Harvard University Press.
- Klevan, M. (1964). Letter to David Stahl, August 5, 1964, Mississippi Summer Project— 1964 (June–November) File, Box 40, LCCRUL Papers.
- Kunstler, W. M. (1994). *My Life as a Radical Lawyer*. New York: Birch Lane Press. Langum, D. J. (1999). *The Most Hated Lawyer in America*. New York: NYU Press.
- Lawyers Committee for Civil Rights Under Law (LCCRUL) (1964). Report to the Members of the Lawyers Committee for Civil Rights Under Law, March 1964, Report to Members—1964 File, Box 1, LCCRUL Papers.
- Lewis, A. (1960). "Do Laws Change the Hearts of Men?" New York Times, May 1: BR6.
- Lewis, J. (1991). "Original Text of Speech to Be Delivered at the Lincoln Memorial." In The Eyes on the Prize Civil Rights Reader, C. Carson, D. J. Garrow, G. Gill, V. Harding, D. C. Hine, eds. New York: Penguin, pp. 163–65.
- Lunney, J. R. (1992). J. Robert Lunney, Interview by Thomas Hilbink, October 9, 1992.
- Marshall, A. M. (2006). "Social Movement Strategies and the Participatory Potential of Litigation." In *Cause Lawyering*, vol. IV, A. Sarat and S. Scheingold, eds. Palo Alto, CA: Stanford University Press, pp. xxx.
- McAdam, D. (1982). Political Processes and the Development of Black Insurgency. Chicago, University of Chicago Press.
- McCann, M. (2004). "Law and Social Movements." In *The Blackwell Companion to Law* and Society, A. Sarat, ed. Malden, MA: Blackwell Publishing, pp. 506–22.
- McCann, M. and J. Dudas (2006). "Backlash: Mapping the Changing Context of Movement Lawyering." In *Cause Lawyering*, vol. IV, A. Sarat and S. Scheingold, eds. Palo Alto, CA: Stanford University Press, pp. xxx.

- McCarthy, J. and M. Zald (1973). *The Trend of Social Movements*. Morristown, NJ: General Learning.
- ______. (1977). "Resource Mobilization and Social Movements." American Journal of Sociology, 82: 1212–41.
- Meier, A. and E. Rudwick (1975). CORE: A Study in the Civil Rights Movement. Urbana, IL: University of Illinois Press.
- Mississippi Summer Project (MSP) (1964). Running Summary of Incidents, no date (ca. August 1964), Pierre Tonachel Papers.
- Moses, R. (1964). Memorandum to Jack Greenberg, no date (ca. April 1964), NAACP folder, Box 7, LCCRUL Papers.
- NAACP Legal Defense and Educational Fund (NAACP-LDF) (1963). 1963 Annual Report, NAACP File, Box 7, LCCRUL Papers.
- NAACP Names a White Counsel. (1961). New York Times, October 5: 1.
- National Lawyers Guild (NLG) (1964). Project Mississippi (pamphlet) (ca. Fall 1964), National Lawyers Guild File, Box 8, LCCRUL Papers.
- Navasky, V. S. (1971). Kennedy Justice. New York: Atheneum.
- Nevas, A. (1964). Letter to Henry Schwarzschild, July 21, 1964, Pierre Tonachel Papers.
- O'Connell, J. and L. T. Bryan (1964). Report to LCCRUL on Activities in Mississippi (ca. Fall 1964), Mississippi Summer Project 1964—Reports File, Box 40, LCCRUL Papers.
- On Civil Rights Frontier: Jack Greenberg. (1961). New York Times, October 5: 31.
- Ostrow, R. W. (1964). Letter to Berl Bernhard, October 30, 1964, Mississippi Summer Project 1964—Reports File, Box 40, LCCRUL Papers.
- Payne, C. M. (1995). *I've Got the Light of Freedom*. Berkeley, CA: University of California Press.
- Perrow, C. (1979). "The Sixties Observed." In *The Dynamics of Social Movements*, M. Zald and J. McCarthy, eds. Cambridge, MA: Winthrop, pp. 192–211.
- Piven, F. F. and R. Cloward (1977). Poor People's Movements. New York: Pantheon.
- Porter, A. (1998). "Norris, Schmidt, Green, Harris, Higginbotham and Associates: The Sociolegal Import of Philadelphia Cause Lawyers." In *Cause Lawyering: Political Commitments and Professional Responsibilities*, A. Sarat and S. Scheingold, eds. New York: Oxford University Press, pp. 151–80.
- Pratt, J. (1992). John Pratt, Interview by Thomas Hilbink, September 13, 1992.
- Rachlin, C. (1992). Interview by Thomas Hilbink, October 13, 1992.
- Ransby, B. (2003). Ella Baker and the Black Freedom Movement. Chapel Hill, NC: University of North Carolina Press.
- Rostow, E. (1963a). Letter to Deputy Attorney General Nicholas Katzenbach, June 3, 1963, Statement of Policy and Program (Rosenman) File, Box 1, LCCRUL Papers.
- (1963b). Letter to President John F. Kennedy (draft), May 15, 1963, Statement of Policy and Program (Rosenman) File, Box 1, LCCRUL Papers.
- Sarat, A. and S. Scheingold (2005). "The Dynamics of Cause Lawyering: Constraints and Opportunities." In *The Worlds Cause Lawyers Make*, A. Sarat and S. Scheingold, eds. Palo Alto, CA: Stanford University Press, pp. 1–34.
- Schulman, R. P. (1965). "Clarksdale Customs." In *Southern Justice*, L. Friedman, ed. New York: Pantheon, pp. 107–11.
- Shamir, R. and S. Chinski (1998). "Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in the Israeli Courts." In *Cause Lawyering: Political*

Commitments and Professional Responsibilities, A. Sarat and S. Scheingold, eds. New York: Oxford University Press, pp. 227-57.

- Staggenborg, S. (1988). "Consequences of Professionalization and Formalization in the Pro-Choice Movement." *American Sociological Review*, 53: 585–605.
- Stone, L. B. (1964). Report to LCCRUL, September 10, 1964, Mississippi Summer Project 1964—Reports File, Box 40, LCCRUL Papers.
- Sullivan, B. M. (1964). Letter to David Stahl, July 16, 1964, Mississippi Summer Project 1964—Reports File, Box 40, LCCRUL Papers.
- Tobol, A. R. (1999). "Badge of Honor: The Law Students Civil Rights Research Council." Ph.D. dissertation, SUNY-Buffalo.
- Tonachel, P. (1964). "There is No Justice, There is No Freedom." Village Voice, New York, September 17: 10–11, 18–19.
- Tushnet, M. V. (1994). Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961. New York: Oxford University Press.
- Tweed, H., B. G. Segal, and H. Packer. (1969). "Civil Rights and Civil Disobedience to Law." In Civil Disobedience: Theory and Practice, H. A. Bedau, ed. New York: Pegasus, pp. 90–97.
- Unsigned (1963). Unsigned Letter (Bernard Segal, drafted), June 4, 1963 (draft letter regarding University of Alabama Crisis), Statement of Policy and Program File, Box 1, LCCRUL Papers.
- ———. (1964). Unsigned memo (likely John Pratt), "Request for Lawyers for Summer Work in Southern States," no date (ca. May 1964), Mississippi Summer Project—— 1964 (April–June 1964) File, Box 40, LCCRUL Papers.
- ------. (1965). Unsigned Memorandum for LCDC volunteers (likely authored by Henry Schwarzschild) (ca. 1965), Frank papers.
- Weisman, L. (1992). Interview by Thomas Hilbink, September 2, 1992.
- Wilkins, R. and J. Jones (1965). Memorandum from Roy Wilkins and John Jones (to Field Foundation), March 29, 1965, NAACP (Special Contribution Fund) 3rd 1965, Box 2s416, Field Foundation Papers.
- Williams, J. (1998). Thurgood Marshall: American Revolutionary. New York: Times Books.
- Wing, John (1964). Letter to Berl I. Bernhard, October 7, 1964, Mississippi Summer Project 1964—Reports File, Box 40, LCCRUL Papers.

Wulf, M. L. (1992). Interview by Thomas Hilbink, September 1, 1992.

Zinn, H. (2002). SNCC: The New Abolitionists. Cambridge, MA: South End Press.

How evangelicals and corporations captured state lawmaking to safeguard white supremacy and corporate power.

A report from the Center for Constitutional Rights, Dream Defenders, Palestine Legal, The Red Nation, and the US Campaign for Palestinian Rights

CONTENTS

Executive Summary		
Part 1: Introduction and a History of ALEC and the People's Resistance	8	
Introduction		
Curbing Social Change: A Brief History of ALEC		
The People's Resistance to ALEC	15	
Part 2: ALEC's Pay-to-Play Politics		
Far-Right Financing: ALEC's Membership and Funding		
ALEC's Corporate Capture Strategy	22	
Closed-Door Annual Meetings	23	
Advancing Corporate and Conservative Agendas Through Model Legislation	23	
Part 3: ALEC's Attacks on People of Color, Civic Engagement, and Dissent	26	
'Stand Your Ground' Laws	29	
The Origin	29	
The Role of ALEC	30	
Stand Your Ground Laws' Impact on People of Color	31	
Voter ID Bills		
The Origin	32	
The Role of ALEC	34	
Voter ID Laws' Impact on People of Color	35	
Anti-'Boycott, Divestment, and Sanctions Bills	36	
The Origin	36	
The Role of ALEC	38	
Anti-BDS Laws' Impact on People of Color	40	
Critical Infrastructure Bills	41	
The Origin	41	
The Role of ALEC	43	
Critical Infrastructure Laws' Impact on People of Color	44	
Part 4: How to Fight for Separation of Corporation and State	52	
Political Advocacy Opportunities	54	
Fighting Laws in Committee	54	
A Role for Attorneys General	55	
Legislative Instruments for Transparency and Accountability		
Open Meetings Laws	56	
Public Records Requests	57	
Disclosure of Legislators' Expenditures and Tax Documents	57	
'Revolving Door' Bans	58	

Continuing the Fight at the International Level	58
Recommendations	64
State Governmental Authorities	64
State Lawmakers	64
Attorneys General	64
Federal Governmental Authorities	64
Internal Revenue Service	64
Progressive Lawmakers in the U.S. Congress	65
Private Sector	65
Journalists and Media Organizations	65
Financial Supporters of Progressive Activism and Organizing	65
Public Interest Organizations	65
Organizers and Movement Groups	65
Progressive Social Justice Organizations	65

ET THE SUPERIOR OF SUPERIOR OF

The cross-movement coalition #AbolishALEC protesting outside the 2018 ALEC Annual Meeting in New Orleans, Louisiana. Photo: Meg Logue

RTA

This report will take a close look at the devastating impacts of the activities of the American Legislative Exchange Council, or ALEC, on communities of color across the country.

ALEC is a highly effective incubator and platform for spreading a broad swath of corporate and conservative policies. According to its own description, "ALEC lets legislators take a good idea and turn it into a perfect fit for the people of their state."¹ In reality, ALEC brings together conservative legislators and corporate lobbyists to develop and disseminate model legislation that sustains corporate power and white supremacy, which has ensured that ALEC has become one of the most powerful, and least known, platforms of its kind in U.S. politics today.

ALEC's success as a political platform for unaccountable interests is indicative of a more general phenomenon known as "corporate capture." In a system of corporate capture, private industry seizes control of the authority of the state, writing legislation and public policy for the general public behind the closed doors of a CEO suite. In the case of ALEC, its structure and influence provide such a reach into U.S. politics that it resembles the elements of a shadow state apparatus.

This report considers ALEC as a case study of corporate capture in the United States. Through its network, conservative and corporate interests have "captured" our political processes to harness profit, further entrench white supremacy in the law, and target the safety, human rights, and self-governance of marginalized communities.

As organizations working within and alongside those targeted by the laws ALEC promotes, we are concerned not just with process, but with outcome, and particularly the outcome as it impacts communities of color. While white supremacy and corporate greed were not born with ALEC, its commitment to proliferating racist and exploitative policies is a profound threat to communities struggling for freedom, equity, and historical justice.

[ALEC's] commitment to proliferating racist and exploitative policies is a profound threat to communities struggling for freedom, equity, and historical justice.

The case studies and analysis in this report are centered on the experiences of impacted communities and reveal how corporate capture is an inherently reactionary phenomenon. Those in power — in this case, the dominant racial and economic classes — commandeer the machinery of government to suppress dissent and stave off socio-political changes aimed at a just redistribution of power and resources, using ever more desperate means of enforcing a racist and exploitative economic and political status quo.

Part 1 of the report will provide an introduction to ALEC. Through a close examination of its history, mission, and internal workings, we consider the group's evolution and highlight key moments of resistance. ALEC was born as a political organizing network for evangelicals resisting the victories of the Civil Rights Movement. Twenty years later, finding it difficult to fund only racist conservative policies, the organization opportunistically partnered with newly politicized corporate entities. The result was the formation of a mutually beneficial financial and political partnership that brought together conservative religious fundamentalists and the economic elite of corporate America, who were both determined to control the

levers of political power to continue reproduction of the socio-economic and political circumstances that perpetuated systemic economic and racial injustices. Here we will also chart the rise in recent years of the efforts by racial justice groups to successfully expose ALEC's deadly impact on Black and Brown lives.

Part 2 of the report will discuss how ALEC currently operates its platform. A tax-exempt charity, ALEC's political strength is in its legislative membership, but the institution is financially solvent thanks to its dues-paying corporate members. Alarmingly, up to a third of all state legislators are members of ALEC, as are several hundred corporations. ALEC brings these lawmakers and corporate executives together behind closed doors twice a year at its convenings. Utilizing the power of ALEC's platform, members of its notorious task forces write and vote to approve prefabricated draft laws, and then ALEC lawmakers commit to funnel the draft laws into state legislatures across the country.

Part 3 provides case studies on the impact of ALEC laws on communities of color. We examine four specific areas: "Stand Your Ground" laws; Voter ID laws; anti-Boycott, Divestment, and Sanctions laws; and Critical Infrastructure laws. Each set of laws relates to ALEC's mission and history differently but is fundamentally aligned with the interests of the group's corporate and conservative members. This section offers analysis of ALEC's role in supporting the proliferation of these laws and documents the origins as well as the harmful effects of the laws on communities of color and their allies.

Part 4 invites reflection on the ways racial justice advocates can resist ALEC's sophisticated and coordinated attacks on communities of color. It draws on successes in social justice movements that have faced similar opposition and offers national and international political and legislative tactics to mitigate the harms of corporate capture and transfer power back to the people.



Protest sign by local activists outside ALEC's 2018 Annual Meeting in New Orleans.



Endnotes

1 American Legislative Exchange Council, 2018 Annual Report, p. 42. Available at: https://www.alec.org/app/uploads/2019/09/2018-Annual-Report_FINAL_WEB_R1.pdf.

Photo Citations

Pages 4-5 The cross-movement coalition #AbolishALEC protesting outside the 2018 ALEC Annual Meeting in New Orleans, Louisiana. Photo: Meg Logue

Part1

INTRODUCTION- A HISTORY IF ALEC & THE PEOPLE'S

Vice President Mike Pence at 2017 Conservative Political Action Conference. Photo: Michael Vado

Introduction

E very year, hundreds of new laws in the United States are passed that emerge not from the needs or the will of the people, but rather from a shadow government composed of social conservatives and corporations seeking to advance their own interests. Behind closed doors, state and local lawmakers meet with conservative, right-wing activists and corporate executives (who pay tens of thousands of dollars for access), and together design model legislation that is then shipped out to state legislatures across the country and passed into law with alarming efficiency.

This co-opting of systems of governance by a private, unaccountable economic elite to advance their own agendas is an example of a phenomenon known as "corporate capture." It is a deliberate strategy employed by corporations and those atop hierarchical systems of power and privilege to maintain the social, political, and economic status quo at the expense of human rights and ecological justice.



Vice President Mike Pence

"I was for ALEC before it was cool." — Vice President Mike Pence²

In other words, corporate capture is a weapon to use the political system to further oppress historically marginalized communities, particularly when those communities demand a more just distribution of power and protection of the environment.

For more than 46 years, the American Legislative Exchange Council (ALEC) has refined the practice of corporate capture into a profitable and highly effective business model. Since 1973, the group has mastered the art of "pay-to-play" politics to provide an overwhelmingly powerful political platform that empowers not only the corporations that fund it, but also the groups that make up its ideologically conservative base.

By exploiting the power of its established networks, ALEC has developed a methodology that is efficient and effective: its corporate members propose or draft legislation in their own interest, and their legislative partners introduce those bills into their own legislative bodies. This happens several hundred times, producing several hundred new laws, in state legislatures across the country each year.³

ALEC has drawn criticism from anti-corruption and watchdog organizations for designing laws behind closed doors without any input from the public. ALEC-affiliated legislators have similarly drawn criticism for introducing legislation into their legislative bodies lifted verbatim from ALEC documents.⁴

However, ALEC's material danger to communities under threat reaches far beyond the anti-democratic processes through which ALEC drives legislation. People of color are also
disproportionately affected by the goals and impacts of much of the legislation ALEC pushes for. ALEC is specifically devoted to expeditiously spreading racist ideas and corporate agendas across the country that target the rights and lives of communities of color.

This section briefly traces the development of the ALEC platform from its founding as a vehicle for politicizing evangelical doctrine and dogma, to its growth as a modern incubator for codifying corporate power. While adding corporate membership to ALEC was born of necessity — funding only the policies that energized evangelical conservative groups proved unsustainable by the early 1990s⁵ — the comfortable corporate conservative alliance reveals the fundamentally illiberal underbelly of corporate capture. Although their individual policy priorities are not necessarily in perfect alignment, both corporations and social conservative share an interest in defending a status quo that enables and is built upon the extraction of profit at an unending human and ecological cost.

Curbing Social Change: A Brief History of ALEC

The second half of the 20th century saw a socio-political revolution in the United States. Social movements across the country challenged dominant power structures that privileged a small, powerful elite class of primarily heterosexual, white, wealthy men, while subjugating everyone else. The Civil Rights and Black Nationalist movements demonstrated immense



ALEC emerged in part as a response to progressive social movements of the 20th century, such as the American Indian Movement (AIM).

people power against a white supremacist society: the formation of the American Indian Movement, or AIM, represented a new incarnation of the centuries-long fight against settler colonialism; a new feminist movement emerged, demanding gender equality; the struggle for queer and trans liberation challenged the heteronormative patriarchy; and the modern environmental movement demanded decisive action on pollution to protect our air, land, and water. Similar progressive forces brought forth significant political change in other countries, including the decades-long social movements that successfully overturned military regimes in Latin America and colonial regimes across Asia and Africa. Among all these struggles, the fights against apartheid in South African and settler colonialism in occupied Palestine garnered enormous international attention.

As has been the case throughout history, these progressive shifts in society and politics were met with a swift backlash from the dominant elite determined to maintain the status quo.

The staunchly right-wing American Christian

evangelical movement was particularly resistant to egalitarian social change. After the U.S. Supreme Court prohibited racial segregation in education in 1954, fundamentalist Christians reacted feverishly to, in their view, "protect" their children by enrolling them in

all-white, private evangelical "segregation academies."⁶ A tipping point came in 1971, when the federal government dealt a potentially fatal blow to segregated education by revoking tax-exempt status from private schools without a non-discrimination policy."7 Prominent American evangelical pastor Jerry Falwell famously complained: "In some states it's easier to open a massage parlor than to open a Christian school."8

Closely following this development was Paul Weyrich, a dedicated conservative Evangelical Christian and aspiring political activist who was already interested in building a politicized American conservative evangelical movement. In the years prior, Weyrich had tried to rally American evangelicals around a number of conservative social causes, including against pornography, for prayer in schools, and against gender equality. But, by his own account, those efforts "utterly failed."9,10

In response to the creeping social change brought on by progressive political movements, most recently in forced racial integration, and to advance his staunchly conservative evangelical political values, Weyrich founded a number of right-wing political organizations. He soon found that the restrictions on segregated education marked a critical change in his community; his evangelical peers were finally as eager as he was to fight back against social progress.

At that moment, Weyrich energized a newly politicized conservative evangelical base by opening its eyes to its ability to reclaim power and roll back civil rights gains through the political process.

One of the organizations Weyrich founded at that time, specifi-

cally to work behind the scenes in state legislatures, was the American Legislative Exchange Council. Weyrich left no doubt that his intention in founding ALEC and similar groups was to overturn the progressing sociopolitical order. What he and others were doing was "different from previous generations of conservatives," he told an audience. "We are no longer working to preserve the status quo. We are radicals, working to overturn the present power structure of this country." ¹¹ He later elaborated on his fundamentalist counter-revolutionary philosophy to his long-time conservative evangelical associate, Richard Viguerie, that what he was engaged in was war. He said, "it may not be with bullets, and it may not be with rockets and missiles, but it is a war, nonetheless. It is a war of ideology, it's a war of ideas, it's a war about our way of life. And it has to be fought with the same intensity, I think, and dedication as you would fight a shooting war."¹² Such was Weyrich's zeal that when former House Speaker Newt Gingrich reflected on the history of modern conservatism, he noted "no single person other than Ronald Reagan has done more to create the modern conservative movement than Paul Weyrich".13

But Weyrich's and his community's fanaticism - and the flush of funding he received from billionaire allies at the outset - was not enough to sustain an organization with such an ambitious agenda forever. Almost twenty years after its founding, ALEC found itself in a funding crisis, with \$2 million of unfunded liabilities.¹⁴ The situation was dire: in 1996, a board member worried that ALEC "will go under if there is not a significant influx of money in a short period of time"¹⁵

Photo: Chip Berle Paul Weyrich, co-founder of ALEC and other conservative organizations including the Heritage Foundation.



While Weyrich and his evangelical peers fought social and racial progress tooth and nail, corporate America faced similar challenges to capitalist orthodoxies. In the early second half of the 20th century, American capitalism faced unprecedented critiques at home from communities protesting the exploitation of laborers and consumers and the racial injustices it compounded. While grassroots movements like the Latinx and immigrant farm workers led by Cesar Chavez and Dolores Huerta challenged the corporate exploitation of laborers, a new movement of lawyers and consumer activists demanded corporate accountability and decried the impacts of corporate deregulation on consumers and the broader public.¹⁶

Like their evangelical counterparts, corporate executives across the country feared the end of their unchecked dominance. A particularly alarmist group of devout capitalists formed the "League to Save Carthage," an association of corporate executives who believed the U.S. was on an inexorable slide toward socialism. ¹⁷

One member of the League to Save Carthage, Lewis F. Powell, drafted a highly influential and now-infamous, staunchly pro-corporate memo to the Director of the U.S. Chamber of Commerce in 1971 that channeled the panic spreading through corporate America.¹⁸ Powell issued a call for American businesses to more assertively influence all sectors of political and social life. In other words, to politicize themselves in the same way that Weyrich had been urging evangelicals to do. According to the Powell memo, at stake was nothing less than "survival – survival of what we call the free enterprise system, and all that this means for the strength and prosperity of America and the freedom of our people."¹⁹ The memo made plain that "businesses must learn the lesson ... that political power is necessary."²⁰

The message was well-received.²¹ Corporate America no longer feared government, but instead saw in it a major opportunity to expand their reach in American political life. Corporations no longer had to play defense; by entering what Powell called the "neglected political arena," they could take the offensive. This was their wake-up call.

A lucrative new lobbying industry emerged. Over the course of the 1970s, the number of companies with a registered lobbyist presence in Washington, D.C. grew from 175 to 2,445. Corporations increasingly waded into electoral politics, as well: in the second half of the 1970s, the



Cesar Chavez, co-founder of the United Farm Workers Union.



Photo: Robert S. Oakes

number of companies with political action committees quadrupled. By the end of the decade, four out of five Fortune 500 companies had an "External Relations" department, considered a "rarity" just years earlier.²²

Perfectly positioned to service the growing group of newly politicized corporate executives was a cash-strapped influential evangelical Christian organization in search of a viable economic model to sustain itself. ALEC identified a lucrative opportunity to stay afloat by harnessing corporate funding. A report prepared for its leadership outlined a suggested approach. Specifically, the report argued that "ALEC must begin to function more like a

"ALEC's product is policy, and its customers are state legislators and private sector supporters." business, and recognize that it has a product that it provides to a defined customer base for a 'profit.' In other words, <u>there can be no mission without margin.</u>"²³ It continued, "ALEC's product is policy, and its customers are state legislators and private sector supporters."²⁴

And where ALEC saw a new and much needed revenue stream, corpo-

rate executives across the country saw an untapped network of political influence to roll back the threat that Powell so desperately warned of.

ALEC revamped its operations to appeal to corporations willing to pay for access. Most notably, it placed a new emphasis on its Task Forces, the groups that bring together corporations and lawmakers to draft model laws. ALEC knew, from the memo provided to leadership, that charging a sizable membership fee to the Task Forces, would prove to be its financial savior.

With a shift in ALEC's business model, its fundamental mission necessarily changed in tandem. Recent data compiled by Alexander Hertel-Fernandez, Assistant Professor in Columbia University's School of International and Public Affairs, shows that in the ensuing years, ALEC increasingly prioritized corporate-driven legislation over the conservative social agenda espoused by its founders. Whereas as much as 20 percent of ALEC model legislation between 1977 and 1979 related to "social issues" such as abortion and religious freedom, only four percent of ALEC model legislation in this timeframe concerned business regulation issues. In the following years, corporations pulled ALEC's focus toward deregulation and corporate profit. By 1993 to 1995, nearly 50 percent of ALEC model legislation was advancing ALEC members' pro-business agenda, while model legislation related to social issues had dropped to just two percent.²⁵

The group's focus had swung back somewhat by the early 2000s, and the back-and-forth continues today, as ALEC's conservative and pro-corporate members share its platform to draft and push through legislation to advance their own interests, twisting and corrupting state-level democratic lawmaking processes to serve their own ends.

The alliance is a natural one: corporate and political elites are two sides of the same proverbial political 'coin'. Capitalist profiteering depends on an exploitative economic system that is based on racial subjugation, and conservative political elites rely on disenfranchising racial minorities to hold on to political power. Each of these branches of white supremacist power — economic and political — serve each other's interests through entities like ALEC that capture and privatize economic and political power at the expense of historically marginalized people. Though white supremacist political and economic power manifest differently in different policy priorities, both thrive by targeting the human rights and self-governance of communities of color.

The People's Resistance to ALEC

ALEC finally came under significant scrutiny by mainstream American progressive organizations following a pivotal event in American politics in 2012: the murder of Trayvon Martin, an unarmed Black teenager killed by a man named George Zimmerman in a gated Florida community. Zimmerman, who fatally shot the teen, was not arrested or charged with a crime for 45 days.²⁶

When he was finally brought into the criminal justice system, commentators widely doubted that prosecutors could convict him of murder, due to an arcane statute passed seven years earlier. The now-infamous "Stand Your Ground" law eliminates the "duty to retreat," effectively providing legal cover to murder when the would-be defendant murderer feels that their life is in danger (regardless of whether it actually is).²⁷



George Zimmerman was acquitted of the murder of Trayvon Martin in part due to Florida's Stand Your Ground law.

When the public learned more about the Stand Your Ground law, interest grew in the origins of the legislation. Soon enough, guided by existing advocacy campaigns, organizers and the general public turned their eyes to the group behind the law

Several advocacy groups, led by Color of Change, already had their sights set on ALEC in response to its behind-the-scenes work passing Voter ID laws leading up to the 2012 election.²⁸ In a 2011 report, the NAACP singled out ALEC as a source of model voter ID legislation intended to disenfranchise minority voters.²⁹ Also that year, the Center for Media and Democracy, having obtained copies of over 800 bills from an internal whistleblower, launched *ALEC Exposed*, a website that publishes, analyzes, and tracks ALEC-affiliated bills. A coalition of these groups, including Color of Change and the Center for Media and Democracy, also launched a public campaign targeting ALEC and its members with petitions, rallies,

and private outreach. The campaign notably included a call to boycott corporate sponsors and affiliates of ALEC.³⁰

But following the murder of Trayvon Martin, racial justice advocates caught a glimpse of the wide-reaching impacts of ALEC's work on communities of color. The boycott campaign against ALEC exploded in size and in impact, as more and more progressive groups joined in. Facing pressure from Color of Change and a grassroots coalition of racial justice activists, a number of companies, including Coca-Cola, PepsiCo, Mars Inc., Wendy's, McDonalds, the Gates Foundation, Kraft, Walgreens, and even Walmart ended their long-standing ALEC memberships.³¹



Protesters take to the streets after the murder of Trayvon Martin.

Although the companies did not mention ALEC by name, a statement released by ALEC just days after losing many corporate sponsors confirms the success of the boycott, or what it called an "intimidation campaign."³²

As ALEC kept losing different funding sources each week, attracting more negative press than it ever had in its forty-year history, the group sought to stem the tide of losses by publicly dissolving the ALEC "Public Safety and Elections Task Force" which was responsible for promoting both voter ID laws and "Stand Your Ground" laws.³³ ALEC refused to admit that the decision to eliminate the task force was due to pressure from the boycott and targeted advocacy, insisting instead that they were "…redoubling [their] efforts on the economic front, a priority that has been the hallmark of [the] organization for decades."³⁴

At the same time, ALEC implemented superficial policy changes internally to deflect criticism of undue corporate influence. After spring 2013, only legislator members of ALEC – and no longer lobbyists – could introduce legislation at ALEC convenings.³⁵ However, documents made public in a lawsuit filed by the Center for Media and Democracy revealed that the change was "just a sham" and corporate members still led the internal policy proposal process.³⁶

By 2013, following the boycott, advocacy campaign, and decision to end the Task Force, ALEC saw more than 100 corporations and 400 state legislators formally sever affiliations.³⁷ With declining membership, the group's budget was dealt a significant blow: at the end of the year, ALEC found itself with a \$1.2 million budget deficit.³⁸

In its 2016-2018 strategic plan, ALEC confirmed the success of the boycott, acknowledging what it euphemistically called a "difficult period": "Given its effectiveness, ALEC is closely scrutinized by the Left and has faced especially harsh attacks from those opposed to free-market policy in the past few years. This caused some upheaval in the organization's funding base, as many corporate members and sponsors broke off to avoid controversy...."³⁹

Another form of resistance ALEC has faced since the groundswell of attention it attracted in 2012 has come in the form of litigation, largely led by a pro-transparency and pro-democracy organization called Common Cause. In April 2012, in the midst of the boycott and aftermath of Trayvon Martin's murder, Common Cause filed a whistleblower complaint against ALEC, accusing the organization of commiting wide-reaching tax fraud. The complaint alleges that ALEC has misrepresented itself to the federal government and has underreported its lobby-ing activities in order to maintain tax-exempt status.⁴⁰

Although the watchdog group has filed three supplemental submissions to the IRS substantiating their claims against ALEC, and a former head of the IRS division in charge of overseeing non-profit and exempt organizations filed a separate complaint on behalf of a group of clergy called Clergy VOICE, the IRS has taken no public action to date.⁴¹ And although ALEC has not commented publicly on the litigation, in spring 2013, it set up an affiliated shadow organization under the IRS 501(c)(4) classification, called the Jeffersonian Project, to conduct the kind of direct political lobbying that ALEC, as a 501(c)(3), cannot.⁴² Although ALEC maintains that it does not conduct political lobbying and is therefore entitled to tax-exempt status, it acknowledged in the internal memo updating its members on the creation of the Jeffersonian Project that "[a]lthough [they] do not believe any activity carried on by ALEC is lobbying, the IRS could disagree. If that is the case, it would be possible to resolve any such issue with the IRS by agreeing to transfer the activity in question from ALEC to the Jeffersonian Project."⁴³ At the same time, a coalition of organizations, including Common Cause and others, has continued appealing directly to corporations to cut their ties with ALEC⁴⁴ and has published a detailed report each year since 2011 exposing ALEC's influence in the state where it decides to hold its annual conference.⁴⁵ Similarly, a coalition of groups has formed another pressure group called Stand Up to ALEC⁴⁶ to encourage constituents to pressure their representatives to cut ties with ALEC.47

ALEC will continue to attract criticism and attention so long as it continues to advocate for laws that undermine the social, economic, and political protections people rely on, particularly people of color. Aside from the "Stand Your Ground," voter ID, anti-Boycott, Divestment, and Sanctions (BDS), and critical infrastructure laws covered in this report, there are many examples of how ALEC has tried, often successfully, to pass regressive laws that have a distinctly negative impact on people of color. ALEC played a role in bringing about SB 1070 - the infamous Arizona law that made it a state misdemeanor crime for an alien to be in Arizona without carrying the required documents. The law effectively granted authority for law enforcement to racially profiling Latinx people, since it exclusively targeted undocumented people, for the benefit of



2010 protest in Washington, DC against Arizona's adoption of SB1070.

ALEC members operating privately-run immigration detention centers.⁴⁸

ALEC also supported its private prison industry members to promulgate laws that increased this industry's profits, such as "three strikes" and "truth in sentencing" laws, as well as laws developed by its members in the bail bond industry that privatize the parole process.⁴⁹ All of these laws disproportionately impact communities of color.

ALEC has also played a central role in the design and development of the deliberately misnamed "Right to Work" laws that do nothing to guarantee employment but instead directly undermine the viability of unions. These laws prevent unions from negotiating contract provisions that require workers to contribute to the costs of worker representation on the job. Right to Work laws depress wages for Black and brown workers compared with non-Right to Work states.⁵⁰

ALEC has long actively denied that the climate crisis,⁵¹ which people of color are disproportionately impacted by, is caused by carbon emissions resulting from human activity.⁵² ALEC wrote in a 2011 submission to the Environmental Protection Agency (EPA) that "carbon dioxide is a naturally occurring, non-toxic and beneficial gas, and it poses no direct threat to public health. In order to justify regulation, the EPA is relying on an uncertain assumption that increased carbon dioxide emissions by humans are causing an unprecedented global temperature increase."53

While these ALEC efforts, and many others not covered in this report such as its attacks on reproductive rights,⁵⁴ have contributed to the rightward shift in law and politics, ALEC's attacks on the planet, people of color, and other historically marginalized communities are inadvertently adding strength to the growing cross-movement resistance to ALEC's efforts. What the legacy of resistance that Center for Media and Democracy, Common Cause, Color of Change and others have shown is that when people of conscience organize and resist, ALEC is weakened. This history provides the path on which a new generation of activists is building.



2 Bill Meierling, "Governor Mike Pence: 'I was for ALEC before it was cool." ALEC Website, August 14, 2016, https://www.alec.org/ article/governor-mike-pence-i-was-for-alec-before-it-was-cool/.

3 See: "Legislative Membership,"American Legislative Exchange Council website, https://www.alec.org/membership-type/legislative-membership/; see also Hertel-Fernandez, at 48 and 72. In its 2000 annual report, ALEC claimed that it introduced 3,100 pieces of legislation in the 1999-2000 legislative cycle, 450 of which became law. See Hertel-Fernandez, 48.

4 For example, see Minnesota House debate from April 25, 2012, where Representative Atkins confronts Representative Gottwalt over Representative Gottwalt's use of ALEC-branded legislative materials when introducing a healthcare bill (SF 1933). See here: https://youtu. be/6kX7JGcQk2I at 2.22.22-2.24.59.

5 By 1988 ALEC was in dire financial circumstances with \$2 million of unfunded liabilities. See: Hertel-Fernandez, 39.

6 Ibid, 303.

7 Internal Revenue Service, Revenue Ruling 71-447, 1971, https://www.irs.gov/pub/irs-tege/rr71-447.pdf.

8 Max Blumenthal, "Agent of Intolerance," The Nation, May 16, 2007, https://www.thenation.com/article/agent-intolerance/.

9 Randall Balmer, "The Real Origins of the Religious Right," *Politico*, May 27, 2014, https://www.politico.com/magazine/story/2014/05/ religious-right-real-origins-107133.

10 Randall Balmer, Thy Kingdom Come: How the Religious Right Distorts Faith and Threatens America (New York: Basic Books, 2007), 15.

11 David Grann, "Robespierre Of The Right," The New Republic, October 27, 1997,

https://newrepublic.com/article/61338/robespierre-the-right.

12 Richard Viguerie, The New Right: We're Ready to Lead (Falls Church, VA: The Viguerie Company, 1981), 55.

13 Alf Tomas Tonnessen, How Two Political Entrepreneurs Helped Create the American Conservative Movement, 1973-1981: The Ideas of Richard Viguerie and Paul Weyrich (Lewiston, NY: Edwin Mellen Press, 2009

14 Hertel-Fernandez, 39.

15 American Legislative Exchange Council, Joint Board of Director Meetings, May 30, 1996,

https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=zlgp0088.

16 Drutman, 55.

17 Jane Mayer, Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right (Anchor Books: New York, 2016), 74.

- 18 Mayer, Dark Money, 89.
- 19 Ibid, 10.
- 20 Ibid, 10.
- 21 Ibid, 24.

22 Jacob S. Hacker and Paul Pierson, Winner-Take-All Politics: How Washington Made the Rich Richer and Turned Its Back On The Middle Class (New York: Simon & Schuster, 2011), 118.

23 American Legislative Exchange Council, Meeting the CHallenge: Ideas + Action = Results. A Business Plan for the American Legislative Exchange Council, 2, https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=slgp0088.

24 Ibid.

25 Hertel-Fernandez, 37.

26 Edward B. Colby, Brian Hamacher, and Lisa Orkin Emmanuel, "George Zimmerman Charged With Second-Degree Murder," *NBC News*, April 11, 2012, https://www.nbcmiami.com/news/George-Zimmerman-Not-a-Flight-Risk-Former-Attorney-146966625.html.

27 Eyder Peralta, "Trayvon Martin Killing Puts 'Stand Your Ground' Law In Spotlight," *National Public Radio*, March 19, 2012, https://www. npr.org/sections/thetwo-way/2012/03/19/148937626/trayvon-martin-killing-puts-stand-your-ground-law-in-spotlight.

28 Center for Media and Democracy, "Color of Change Targets ALEC Corporations," *PR Watch*, December 15, 2011, https://www.prwatch.org/news/2011/12/11186/color-change-targets-alec-corporations.

29 NAACP Legal Defense and Educational Fund, "Defending Democracy: Confronting Modern Barriers to Voting Rights in America," 2011, https://www.naacpldf.org/wp-content/uploads/Defending-Democracy-12-16-11.pdf.

30 Color of Change, "Targeting and Weakening ALEC," https://colorofchange.org/campaigns/victories/targeting-and-weakening-alec/.

31 Hertel-Fernandez, 59; Peter Overby, "Boycotts Hitting Group Behind 'Stand Your Ground," *National Public Radio*, April 5, 2012, https://www.npr.org/2012/04/05/150013705/boycotts-hitting-group-behind-stand-your-ground; Elspeth Reeve, "ALEC, Group That Pushed Stand Your Ground, Quits the Culture Wars," *The Atlantic*, https://www.theatlantic.com/politics/archive/2012/04/alec-grouppushed-stand-your-ground-quits-culture-wars/329233.

32 American Legislative Exchange Council, "Statement by ALEC in Response to the Outpouring of Support in Wake of Intimidation Campaign Against Its Members," ALEC press release, April 12, 2012,

0120418023152/ https://www.alec.org/2012/04/statement-by-alec-in-response-to-the-outpouring-of-support-in-wake-of-intimidation-campaign-against-its-members/.

33 Eric Lichtblau, "Martin Death Spurs Group to Readjust Policy Focus," New York Times, April 17, 2012, https://www.nytimes. com/2012/04/18/us/trayvon-martin-death-spurs-group-to-readjust-policy-focus.html; Adam Sorensen, "ALEC Scraps Gun-Law, Voter-ID Task Force," Time, April 17, 2012, http://swampland.time.com/2012/04/17/alec-scraps-gun-law-voter-id-task-force/.

34 American Legislative Exchange Council, "ALEC Sharpens Focus on Jobs, Free Markets and Growth – Announces the End of the Task Force that Dealt with Non-Economic Issues," ALEC press release, April 17, 2012,

https://web.archive.org/web/20120418133212/http://www.alec.org/2012/04/alec-sharpens-focus-on-jobs-free-markets-and-growth-announces-the-end-of-the-task-force-that-dealt-with-non-economic-issues/.

35 Common Cause and the Center for Media and Democracy, joint letter to IRS, May 12, 2015, https://www.commoncause.org/wp-content/uploads/legacy/policy-and-litigation/letters-to-government-officials/joint-letter-to-irs-alec-tax-status.pdf.

36 Ibid.

37 Color of Change, "Targeting and Weakening ALEC," https://colorofchange.org/campaigns/victories/targeting-and-weakening-alec/

38 Ibid.

39 American Legislative Exchange Council, *Strategic Plan: 2016-2018*, 8, https://www.alec.org/app/uploads/2016/06/ALEC-Strat-Plan-Final-051616.pdf

40 Common Cause, ALEC Whistleblower Complaint, webpage, October 1, 2016, https://www.commoncause.org/resource/alec-whistleblower-complaint/.

41 John Dubnar, "ALEC Faces New Challenge to Tax-Exempt Status," *Center for Public Integrity*, July 2, 2012, https://publicintegrity.org/federal-politics/alec-faces-new-challenge-to-tax-exempt-status/.

42 Common Cause and the Center for Media and Democracy, joint letter to IRS, May 12, 2015, https://www.commoncause.org/wp-content/uploads/legacy/policy-and-litigation/letters-to-government-officials/joint-letter-to-irs-alec-tax-status.pdf.

43 American Legislative Exchange Council, "Board/PEAC Committee Meetings," August 6, 2013, 13, https://www.documentcloud.org/documents/841593-alec-docs.html#document/p13/a134830.

44 https://www.commoncause.org/resource/coalition-letters-to-alec-corporate-funders/.

45 Jay Riestenberg, Common Cause, "Coalition Letters to ALEC Corporate Funders," August 26, 2018, https://www.commoncause.org/our-work/money-influence/alec/.

46 Alliance for Retired Americans, "Stand up to the American Legislative Exchange Council and Protect Pensions," March 14, 2014, https://retiredamericans.org/stand-up-to-the-american-legislative-exchange-council-and-protect-pensions/.

47 Stand Up to ALEC, homepage, https://standuptoalec.org/.

48 Beau Hodai, "Corporate Con Game," In These Times, June 21, 2010, http://inthesetimes.com/article/6084/corporate_con_game/.

49 Mike Elk and Bob Sloan, "The Hidden History of ALEC and Prison Labor," *The Nation*, August 1, 2011, https://www.thenation.com/ article/hidden-history-alec-and-prison-labor/.

50 Valerie Wilson and Julia Wolfe, "Black workers in right-to-work (RTW) states tend to have lower wages than in Missouri and other non-RTW states," Economic Policy Institute, May 15, 2018, https://www.epi.org/publication/black-workers-in-right-to-work-rtw-states-tend-to-have-lower-wages-than-in-missouri-and-other-non-rtw-states/.

51 ALEC & Climate Change Denial, homepage, http://alecclimatechangedenial.org/.

52 American Public Health Association, "An Introduction to Climate Change, Health, and Equity: A Guide for Local Health Departments," Climate Health Connect, http://climatehealthconnect.org/wp-content/uploads/2018/10/Guide_Overview.pdf, p.3.

53 American Legislative Exchange Council, Submission to the Environmental Protection Agency, "Re: Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units," 2011, https://web.archive.org/web/20120701002053/http://www.alec.org/wp-content/uploads/Comment_ALEC_Docket-ID_No.-EPA-HQ-OAR-2011-0660.pdf.

54 Wisconsin House Representative, Chris Taylor "The Attack on Planned Parenthood," *Truthout*, July 31, 2015, https://truthout.org/ articles/the-attack-on-planned-parenthood-a-view-from-inside-alec/.

Photo Citations

Pages 8-9 Cover Photo: "Vice President Mike Pence at CPAC 2017" by Michael Vadon is licensed under CC BY-SA 4.0.

Page 11 Photograph of American Indian Protest in Seattle, Washington" by U.S. National Archives and Records Administration is Public Domain.

Page 12 "Paul Weyrich in 2007 in Washington, DC at the Values Voters conference" by Chip Berlet is licensed by CC BY-SA 3.0.

Page 13(a) "César Chávez – speaking at the Delano UFW–United Farm Workers rally in Delano, California, June 1972." by Joel Levine is licensed by CC BY

Page 13(b) "Official portrait of Justice Lewis Franklin Powell, Jr." by Robert S. Oakes is PD-USGov.

Page 15(a) "Mug Shot from Seminole County Florida for George Zimmerman" by Seminole County Sheriff's Office is Public Domain.

Page 15(b) "Trayvon Martin Rally in Hollywood" by Greg Lilly is licensed by CC BY-NC 2.0.

Page 17 "Immigration Reform Leaders Arrested 5" by Nevele Otseog is licensed by CC BY 2.0.

Part 2 ALEC'S PAY-TO-PLAY POLITICS



B y its own account, ALEC seeks to "…increase individual liberty, prosperity and the well-being of all Americans by advancing and promoting the principles of limited government, free markets and federalism."⁵⁵ ALEC's vague and seemingly benign mission statement disguises how this registered tax-exempt charitable organization regularly convenes its members, made up of corporate executives, conservative state lawmakers, conservative activists, and funders, to privately craft self-serving model legislation that advances their agendas away from public scrutiny.

Far-Right Financing: ALEC's Membership and Funding

ALEC's impact comes from its astoundingly broad membership. According to its own website, nearly one-third of all state legislators are members.⁵⁶ In 2016, it also counted among its members eight sitting governors, 300 local politicians, and over 200 corporations and conservative think tanks with non-profit charitable tax status.⁵⁷

ALEC's 2017 budget, the last available ALEC filing to the IRS, was \$10.3 million. \$8,765,064 of this total revenue stream came from corporate membership dues and grants from conservative foundations, which is equal to almost 90 percent of its revenue.⁵⁸

In its early years, ALEC did not generate any significant revenue from corporations; what revenue it did generate came from radical conservative foundations like the Adolph Coors Foundation and the Scaife Foundation.⁵⁹ Beginning in the early 1990s, ALEC shifted its funding strategy to more explicitly seek funding from corporations. The strategy proved successful, such that between 1988 and 1992 ALEC more than doubled its annual revenue from \$1.5 million to \$3.9 million.⁶⁰

Research indicates that ALEC still receives a substantial number of grants from wealthy far-right conservative donors; the collection of foundations run by the Koch brothers donated more than \$3 million between 1997 and 2017.⁶¹

Nearly one-third of all state legislators are members of ALEC

With legislative members at all levels of government across the country, ALEC has been extraordinarily effective at passing its favored legislation. It has been reported that in 2009, ALEC legislators introduced 826 bills and passed 115 into law.⁶² The New York Times reported that in 2011, "...ALEC typically introduced more than 1,000 bills based on model legislation each year and passed about 17 percent of them."⁶³

ALEC's Corporate Capture Strategy

ALEC is so effective because of the operating model it has perfected. It brings together its members — corporate, legislative, and otherwise — twice a year to exchange conservative and corporate ideas they form into draft legislation that they then vote on, and later farm out to state legislatures to pass into state law. Its signature tactic, however, which has distinguished it from other conservative policy think tanks and organizations, is its use of its so-called 'Task Forces."

Closed-Door Annual Meetings

In ALEC's own words, its meetings are "where the action is."⁶⁴ It holds its Annual Meeting each summer, shortly after most states' legislative sessions have ended. There, corporate leaders, lawmakers, and others with an interest in ALEC's work come together to attend workshops, hear keynote speeches, and ultimately forge right-wing social and economic policy.

The 2016 Annual Meeting welcomed more than 2,500 attendees, including an undisclosed number of state legislators and more than 200 business executives discussing a range of issues in more than 20 workshops.⁶⁵ A leaked copy of the 2015 Annual Meeting agenda revealed the corporate make-up and themes of workshops, as well as the titles of a number of subcommittees and working groups.⁶⁶ The annual meetings often

The annual meetings often attract high-profile conservative keynote speakers, many of whom are in powerful government positions

attract high-profile conservative keynote speakers, many of whom are in powerful government positions; in 2016, then Vice Presidential Candidate Mike Pence told the audience at the annual meeting in Indiana that he "…was for ALEC before it was cool."⁶⁷

Each December, ALEC holds a States and Nation Policy Summit, "specifically designed to introduce new members to ALEC" following the November elections held a month prior.⁶⁸ In addition to welcoming new members to ALEC, the winter convening serves as a brainstorming session for the upcoming state legislative sessions and a forum at which corporate executives and high-profile conservative politicians lead "…intensive, in-depth educational sessions addressing issues that will be at the top of state legislative agendas the following year."⁶⁹ Speakers at the 2018 winter convening included Trump administration Office of Management and Budget Director Mick Mulvaney, Secretary of Housing and Urban Development Ben Carson, and Senator Ted Cruz.⁷⁰

Until 2018, ALEC also held a meeting for members each spring, but ALEC eliminated this event in 2019, reportedly in response to at least 366 ALEC-affiliated lawmakers losing re-election in November 2018 and several corporate members cutting ties.⁷¹

NEWS | POLITICS & ELECTIONS

ALEC Drops Spring Meeting Months After Losing Hundreds of Members in Midterms

Jamie Corey & Lisa Graves, Documented, March 31, 2019

Advancing Corporate and Conservative Agendas Through Model Legislation

If ALEC's meeting are "where the action is," its Task Forces are how the work gets done. Cochaired by corporate executives and legislators, the Task Forces "bring elected officials, policy experts and business leaders together" to advance ALEC's profit-driven and ideologically conservative agenda. Each Task Force, like a Congressional subcommittee, covers a policy

Photo: White House/ Ronald Reagan Presidential Library

area and reviews model legislation before it heads to the full membership for a broader vote of approval and adoption. And, although the Task Forces are supposed to serve as a neutral preliminary stage for pending model legislation, the corporate members maintain disproportionate control through veto power and even the ability to remove their legislative co-members at will (whereas corporate members can only be removed "with cause"). ⁷²

ALEC's Task Forces were inspired by the Reagan Administration's "Task Force on Federalism." Early into his presidency,



Joseph Coors, co-founder of the Adolph Coors Foundation and president of Coors Brewing Company, was one of the early financial backers of ALEC.

Reagan convened a working group to to bring states and the federal government together to work toward limited government. Early participants included the then national chairman of ALEC, Tom Stivers, and ALEC members John Kasich and Rober Monier. Five years after Reagan convened his Task Force on Federalism, ALEC announced the creation of their own internal Task Forces, each with a thematic mandate, together covering "virtually every responsibility of state government."⁷³

Today, there are 11 Task Forces covering such topics as Energy, Environment, and Agriculture; Federalism; Criminal Justice; and Homeland Security.⁷⁴



Endnotes

55 American Legislative Exchange Council, *Strategic Plan*: 2016-2018, https://www.alec.org/app/uploads/2016/06/ALEC-Strat-Plan-Final-051616.pdf.

56 Legislative Membership webpage, American Legislative Exchange Council, https://www.alec.org/membership-type/legislative-membership/.

57 American Legislative Exchange Council, *Strategic Plan*: 2016-2018, https://www.alec.org/app/uploads/2016/06/ALEC-Strat-Plan-Final-051616.pdf.

58 American Legislative Exchange Council IRS Form 990, Year 2017,

https://990s.foundationcenter.org/990_pdf_archive/520/520140979/520140979_201712_990.pdf.

59 Jason Stahl, Right Moves: The Conservative Think Tank in American Political Culture since 1945 (Chapel Hill: University of North Carolina Press), 71-72.

60 American Legislative Exchange Council, "Winning the Debate in the States: 1992 Annual Report," published by Legacy Tobacco Archives, University of California, San Francisco, https://www.industrydocuments.ucsf.edu/tobacco/docs/#id=hqyn0037.

61 Greenpeace USA, "American Legislative Exchange Council – Koch Industries Climate Denial Front Group," webpage, https://www.greenpeace.org/usa/global-warming/climate-deniers/front-groups/american-legislative-exchange-council-alec/.

62 Tory Newmyer,"The big political player you've never heard of," *Fortune*, January 11, 2011, https://fortune.com/2011/01/10/the-big-political-player-youve-never-heard-of/.

63 Mike McIntire, "Conservative Nonprofit Acts as a Stealth Business Lobbyist," *New York Times*, April 21, 2012, https://www.nytimes. com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html.

64 Ibid.

65 Ibid.

66 2015 Annual Meeting Agenda, American Legislative Exchange Council, https://www.documentcloud.org/documents/3232576-Annual-Meeting-Agenda-ALEC-American-Legislative.html.

67 Bill Meierling, "Governor Mike Pence: 'I was for ALEC before it was cool.'" ALEC website, August 14, 2016, https://www.alec.org/ article/governor-mike-pence-i-was-for-alec-before-it-was-cool/.

68 American Legislative Exchange Council, 2019 States and Nation Policy Summit webpage, https://www.alec.org/meeting/2019-states-nation-policy-summit-scottsdale/.

69 American Legislative Exchange Council, *Strategic Plan: 2016-2018*, https://www.alec.org/app/uploads/2016/06/ALEC-Strat-Plan-Final-051616.pdf, 13.

70 All Speakers from the ALEC States and Nation Policy Summit, American Legislative Exchange Council, December 4, 2018, https://www.alec.org/article/all-speakers-from-the-alec-states-and-nation-policy-summit/.

71 Jamie Corey and Lisa Graves, "ALEC Drops Spring Meeting Months After Losing Hundreds of Members in Midterms," *Truthout*, March 31, 2019, https://truthout.org/articles/alec-drops-spring-meeting-months-after-losing-hundreds-of-members-in-midterms/.

72 Mike McIntire, "Conservative Nonprofit Acts as a Stealth Lobbyist," *The New York Times*, April 21, 2012, https://www.nytimes. com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html.

73 History webpage, American Legislative Exchange Council, http://alec.devhm.net/about-alec/history/.

74 Task Forces webpage, American Legislative Exchange Council, https://www.alec.org/task-force/.

Photo Citations

Pages 20-21 "Secretary Acosta's Remarks at ALEC in Denver, CO" by Shawn T Moore, Department of Labor is Public Domain.

Page 23 Jamie Corey & Lisa Graves, Documented, "ALEC Drops Spring Meeting Months After Losing Hundreds of Members in Midterms," republished on Truthout, March 31, 2019

Page 24 "Ronald Regan [sic] and Joseph Coors" by White House/ Ronald Reagan Presidential Library is Public Domain.



The parallel ideological priorities that co-exist within ALEC, advancing both conservative social policy and opportunities for corporate profit-making, drive its current political efforts. These objectives reflect the two central elements of ALEC's mission: on one side, its conservative evangelical roots continue to resist social progress, while on the other, the corporate members continue to advance deregulation and privatization.

But whether motivated by corporate profit or conservative ideology, ALEC's behind-thescenes maneuvering consistently has a disproportionate and harmful impact on communities of color. In some areas of law, the link between corporate interests and attacks on communities of color is clear. For example, in the name of protecting profits of oil and gas companies, ALEC has sponsored so-called "critical infrastructure" bills that dramatically enhance criminal penalties for the Indigenous water protectors (and their allies) who protest construction of fossil fuel infrastructure projects. As introduced in Part I, ALEC was also critical to the proliferation of Stand Your Ground laws in state legislatures around the country, protecting NRA profits while endangering Black lives.

On other issues covered in this report, like voter ID and anti-Boycott, Divestment, and Sanction bills,⁷⁵ we see a modern incarnation of ALEC's ideological fundamentalist evangelical roots. ALEC's members rely on its powerful political platform to advance the white supremacist ideology of right-wing evangelical groups. As Weyrich sought to on racial segregation, today's ALEC

ALEC's behind-the-scenes maneuvering consistently has a disproportionate and harmful impact on communities of color

seeks not only to pass favored pieces of legislation, but to change the terms of the debate itself. By lending its political platform to the reactionary forces behind bills seeking to vilify an entire movement for human rights and re-define "antisemitism" to serve its own political ends,⁷⁶ ALEC empowers Paul Weyrich's modern-day evangelical and fundamentalist counterparts in their quest to redefine the social order.

Part 3 of the report will detail four areas of legislation that ALEC has recently promoted or is currently championing and illustrate how each has disproportionately targeted and affected communities of color beginning with a discussion of ALEC's involvement in providing a platform for encouraging passage of "Stand Your Ground" laws across the country. These laws can be traced back to the National Rifle Association (NRA), a corporate member of the group representing the interests of gun and ammunition manufacturers, but have been fiercely opposed by racial justice groups for the impunity they have extended to those who murder Black people.

The focus will then move to so-called voter ID laws, a modern-day reincarnation of Jim Crow voting restrictions designed to suppress the power of Black and Brown communities in the political system. These the anti-democratic measures further the beliefs of ALEC's co-founder, Paul Weyrich, that "not everyone should vote," perpetuating white supremacy over political power.⁷⁷

Part 3 will then consider "critical infrastructure" laws, pieces of legislation that strengthen the power of the legal system to criminalize Indigenous and allied water protectors fighting to resist the expansion of this country's vast and dangerous oil and gas infrastructure. Conceived of by representatives of the oil and gas industry to protect corporate profits, "critical infrastructure" laws have continued this country's long legacy of criminalizing Indigenous people who have never stopped protesting against the theft of their land, resources, and wealth, and the accumulation of power by the white elite of the U.S.

The final section of Part 3 will consider "anti-BDS laws," which are designed to delegitimize and attack a Palestinian-led boycott movement for human rights. That ALEC is involved in supporting the passage of these laws is perhaps unsurprising given ALEC's deep evangelical history. It was tele-evangelist Jerry Falwell, a close contemporary of ALEC founder Paul Weyrich, who said "to stand against Israel is to stand against God." The roots of fundamentalist Christian support for Zionism stretch back to at least the writings of John Darby in the mid-1800s, and carry through to the present day, with most modern evangelicals believing that the creation of Israel is a necessary step to bringing about the second coming of Jesus Christ.⁷⁸ Hence, it is no surprise that conservative Christian evangelical groups within ALEC played an influential role in supporting passage of a set of laws designed to criminalize advocacy for Palestinian rights.

For each area of legislation, the report will give a brief historical overview of the laws and detail the use by ALEC members of its platform to raise-awareness about and repackage emerging pro-conservative and pro-corporate issues into draft laws that are distributed to and passed through state legislatures across the country. The sections below will then examine the specific harms these laws have on communities of color.



Sign at #AbolishALEC protest, ALEC Annual Meeting, New Orleans, July 2018.

'Stand Your Ground' laws

The Origin

Twenty-seven states now have a "Castle Doctrine" or "Stand Your Ground" law similar to the first one developed in Florida, SB 436, which was signed into law by Governor Jeb Bush on April 26, 2005.⁷⁹ Section 3 reads:

A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.⁸⁰

The law was drafted by Marion Hammer, the National Rifle Association's (NRA) lobbyist in Florida and former president of the NRA.⁸¹ The NRA is a long-time member of ALEC, and Hammer had developed a particularly strong reputation for influencing Florida politicians to pass legislation favorable to gun manufacturers.⁸² As Paul Flemming, then-reporter for *Florida Today* told a media watchdog, "There is no doubt about it.... All of the gun laws that come through the Florida legislature, she writes."⁸³

The Role of ALEC

The primary sponsors for Florida's "Stand Your Ground" bill were ALEC members state Representative Dennis Baxley and state Senator Durell Peadon.⁸⁴ The lawmakers worked closely with Marion Hammer and the NRA to pass the law, and their partnership exemplifies both the close relationships between gun lobbyists and elected officials, and the mechanism for proliferating ALEC legislation throughout the country. In 2005, the NRA described how it utilized the ALEC platform to support wider adoption of "Stand Your Ground" laws in other states:

Marion Hammer presented the ALEC Criminal Justice Task Force with proposed legislation based on Florida's landmark "Castle Doctrine" law, that passed in Florida earlier this year. Her talk was well-received, and the Task Force subsequently adopted the measure unanimously. It will officially become ALEC Model Legislation in 30 days if there is no objection from the ALEC Board of Directors.⁸⁵

Indeed, four months after the Florida "Stand Your Ground" law was passed, the ALEC Board of Directors approved the model legislation in August 2005.⁸⁶ Furthermore, former ALEC

employee and current Maryland state senator Michael Hough indicated publicly that ALEC worked with the NRA to develop the model policy, and then introduced it in states across the country. On NRA TV he stated that, "we worked with the NRA with that, that's one of our model bills that we have states introduce."⁸⁷

The NRA heightened its investment and support of ALEC in later years, and, according to research by Progress Florida, "The NRA co-chaired the ALEC Public Safety and Elections Task Force from 2008 to 2011, and has made large contributions to the group – for example, in 2011, the NRA donated \$25,000 to ALEC to achieve "Vice-Chairman" level sponsorship for the annual conference."⁸⁸



Gov. Jeb Bush, center, hands a pen used to sign a Gun Bill to Marion Hammer of the National Rifle Association.

The NRA's return on its investment in ALEC, and the passage of Stand Your Ground laws, comes in the form of contributions it receives from the firearms industry. A detailed report on corporate sponsorship of the NRA and found that "[c]ontributions to the NRA from the firearms industry since 2005 total between \$14.7 million and \$38.9 million."⁸⁹ The report also noted that "[i]n a promotional brochure for the program, NRA Executive-Vice President Wayne LaPierre promises that the 'National Rifle Association's newly expanded Corporate Partners Program is an opportunity for corporations to partner with the NRA....This program is geared toward your company's corporate interests."

In the year following Florida's passage of its Stand Your Ground law, and after ALEC had approved a model policy, 13 states passed a similar version.⁹¹ According to the National Conference of State Legislatures, "laws in at least 25 states allow that there is no duty to retreat an attacker in any place in which one is lawfully present" and "at least ten of those states include language stating one may 'stand his or her ground.""92

Stand Your Ground Laws' Impact on People of Color

In 2012, Floridian George Zimmerman shot and killed an unarmed, 17-year-old Black teenager named Trayvon Martin. Trayvon was a student from Krop Senior High School outside Miami, and had been visiting his father in Sanford, Florida when he was killed. Zimmerman was a neighborhood watch captain for "The Retreat at Twin Lakes," a gated community in Sanford, and was patrolling the neighborhood the night that he killed Trayvon.⁹³ *Time* magazine reported on the incident a few weeks later:

> Martin was in the gated community with his father as they visited the home of family friends. He had gone to a nearby 7-11 for snacks and was on his way back to the house when he was spotted by Zimmerman, who called police to report a "real suspicious" guy." He told the dispatcher that Martin "looks like he's up to no good or he's on drugs or something." He described Martin as having his hand on his waistband, carrying an object, and coming towards him. "And he's a black male...Something's wrong with him...These a**holes, they always get away."94

In July 2013 a jury found Zimmerman not guilty of second-degree murder or manslaughter.

In a media interview with CNN's Anderson Cooper after the verdict, a juror explained how Stand Your Ground had played a role in determining Zimmerman's culpability:

> **COOPER:** Because of the two options you had, second degree murder or manslaughter, you felt neither applied?

JUROR: Right. Because of the heat of the moment and the Stand Your Ground. He had a right to defend himself. If he felt threatened that his life was going to be taken away from him or he was going to have bodily harm, he had a right.⁹⁵

ALEC ATT

How evangelicals and corporations captured state lawmaking to safeguard white supremacy and corporate power

STAND YOUR GROUND LAWS

Stand your ground laws establish the right of a person to defend one's self against threats (or perceived threats), including the application of lethal force, regardless of whether safely retreating from the situation might have been possible.

Florida Governor Jeb Bush signs into

2005

law the first stand your ground law, SB 436. The bill was drafted by the NRA and sponsored by ALEC members. state Representative Dennis Baxley and state Senator Durell Peadon.

> Between 2005 and 2014, . There was no increase in states that did not have a stand your ground law.

homicide by firearm 2014



In 2012, 17-year-old Black teenager Trayvon Martin was shot and killed by George Zimmerman near his father's home in Florida. One year after his death, a jury found his killer not guilty of second-degree murder or manslaughter, citing Florida's stand your ground law



A 2013 study found that in stand your ground states, a judge is 12 times more likely to rule a white-on-Black shooting "justified" than a Black-on-white shooting.

Follow the link below and call on your elected officials to cut all ties with ALEC:

ccrjustice.org/ALECattacks



Since Stand Your Ground laws have become more widespread across the United States, researchers have begun to examine their impact. A widely cited 2016 study published in the Journal of the American Medical Association found that:

> Since Florida's stand your ground law took effect in October 2005, rates of homicide and homicide by firearm in the state have significantly increased; through 2014, monthly rates of homicide increased by 24.4% and monthly rates



Trayvon Martin's parents at Million Hoodies Union Square protest in New York, 2012

of homicide by firearm by 31.6%. These increases appear to have occurred despite a general decline in homicide in the United States since the early 1990s.⁹⁶ In contrast, rates of homicide and homicide by firearm did not increase in states without a stand your ground law (New York, New Jersey, Ohio, and Virginia), or for either suicide or suicide by firearm. Our findings support the hypothesis that increases in the homicide and homicide by firearm rates in Florida are related to the stand your ground law.⁹⁷

A 2013 study by Urban Institute examined the intersection of race and justifiable homicide rates in states with and without stand your ground laws. The study found that:

Overall, the rate of justifiable homicides is almost six times higher in cases with attributes that match the Martin case. Racial disparities are much larger, as white-on-black homicides have justifiable findings 33 percentage points more often than black-on-white homicides. Stand your ground [SYG] laws appear to exacerbate those differences, as cases overall are significantly more likely to be ruled justified in SYG states than in non-SYG states.⁹⁸

The study noted that, "with respect to race, controlling for all other case attributes, the odds that a white-on-black homicide is found justified is 281 percent greater than the odds a white-on-white homicide is found justified. By contrast, a black-on-white homicide has barely half the odds of being ruled justifiable relative to white-on-white homicides."99

Voter ID bills

The Origin

Measures to disenfranchise people of color abound in U.S. history. For example, strategies by white supremacists, such as administering reading tests to would-be Black voters, have been in existence since the beginning of the Jim Crow era.

In a 1940 address to union workers, President Roosevelt stated that "there are some political candidates who think that they may have a chance of election, if only the total vote is small enough."¹⁰⁰

In the wake of the controversial 2000 U.S. presidential election where, by one estimate, almost two million votes were disqualified,¹⁰¹ former presidents Jimmy Carter and Gerald Ford formed the Nation-



Judges, Congressmen and Solicitors:

GLORIOUS VICTORIES

Headline in The King's Weekly following the 1898 midterm elections, North Carolina.

al Commission on Federal Election Reform (known also as the 'Carter-Ford Commission'), with various recommendations, one of which was a voter ID requirement. Federal legislation followed in the form of the 'Help America Vote Act' (HAVA) in 2002, which included a voter ID requirement for first-time voters.¹⁰² Following the 2004 presidential election, former President Carter again established a commission to examine ways of further amending the electoral voting system, this time together with former Secretary of State James A. Baker III. In 2005, their commission issued a report entitled "Building Confidence in U.S. Elections."¹⁰³

The co-chairs of the report justified the need for further reforms by noting that, "many Americans thought that one report — the Carter-Ford Commission — and one law — the Help America Vote Act of 2002 (HAVA) — would be enough to fix the system. It isn't." As such, they said, "we are recommending a photo ID system for voters designed to increase registration with a more affirmative and aggressive role for states in finding new voters and providing free IDs for those without driver's licenses. The formula we recommend will result in both more integrity and more access."¹⁰⁴

One commissioner, Professor Spencer Overton, strongly disagreed with the findings of the Carter-Baker 2005 Commission he was a part of. Overton noted that the voter ID recommendation is "more extreme than any ID requirement adopted in any state to date.... The existing evidence suggests that the type of fraud addressed by photo ID requirements is extraordinarily small and that the number of eligible citizens who would be denied their right to vote as a result of the Commission's ID proposal is exceedingly large." On procedural issues Commissioner Overton raised his dissent by stating that the "commission's reliance on anecdotes and political sound bites — rather than empirical data, testimony by top experts, and rigorous analysis undermines its credibility."¹⁰⁵

In the 2006 U.S. midterm federal elections, Democrats made significant advances, gaining control of the House and Senate. In the aftermath, Republicans alleged that "voter fraud" played a role in delivering election wins for the Democrats. Royal Masset, the former political director



Protestor at Occupy Boston protest in 2011 against Voter ID laws. Photo: sharonkubc

for the Republican Party of Texas and skeptic of the need for voter ID laws, informed a reporter for the Houston Chronicle that:

We fulfilled our conservative agenda. To appear new we took more and more extreme positions. We became arrogant and self righteous... It's almost a religious part of the Republican canon that Democrats are stealing these elections. It's a lie. It's not true. It does not exist. I must have gotten 200 calls from people who wanted a criminal investigation of so-and-so because they lost by 100 votes and were sure there was fraud. They could never prove anything.¹⁰⁶



The results of an investigation launched by the U.S. Department of Justice between 2002 and 2005 found almost no evidence at

all to substantiate the long-held conspiracy theory of voter fraud that Republican politicians have repeated ad nauseum to justify the need for voter ID laws.¹⁰⁷ Republicans' insistence on the presence of voter fraud only increased following the 2008 election of President Barack Obama.

The Role of ALEC

In June 2009, ALEC's publication *Inside ALEC* ran a story called "Preventing Voter Fraud," detailing what voter ID bills should include to survive constitutional challenges. The guidelines were based on the 2005 Carter-Baker Commission and the Supreme Court findings in *Crawford v. Marion County Election Board*, a case involving a dispute over Indiana's 2005 voter ID law.¹⁰⁸ ALEC stressed in its publication that to"improve the chances of a law being upheld in court," voter ID bills should include distribution of free voter ID cards, availability of provisional ballots as well as strong promotion of the new law and comprehensive distribution of ID cards. These elements were incorporated into ALEC's "Taxpayer and Citizen Protection Act" which was drafted by its Criminal Justice and Homeland Security Task Force and approved by ALEC's Board of Directors in June 2008.¹⁰⁹ In August 2009, ALEC held its annual meeting, and the ALEC Board of Directors approved ALEC's "Voter ID Act," produced by the



ALEC Task Force on Public Safety and Elections.¹¹⁰ These pieces of ALEC model legislation contain many provisions, but essentially the first requires voters to demonstrate U.S. citizenship prior to voting or registering to vote, and the second requires all voters to show certain types of ID prior to voting.

Between 2008-2010, the years immediately following the U.S. Supreme Court decision in *Crawford v. Marion County Election Board*, no state passed a strict voter ID law requiring photo identification (although Oklahoma, Utah, and Idaho passed laws with what the non-partisan National Conference of State Legislatures calls "non-strict, non-photo ID requirement").¹¹¹ However, when Republicans gained full control of an additional 11 state legislatures in the 2010 midterm elections, ALEC moved fast. In 2011, five strict photo ID laws and one non-strict law passed through state legislatures — all Republican controlled and all sponsored by ALEC-member lawmakers.¹¹² Others followed in 2012 and 2013, but the pace has since slowed.¹¹³ All told, 35 states now have some form of voter ID law in effect.¹¹⁴

Voter ID Laws' Impact on People of Color

"I want to see my vote counted. Let me be there. I wanna be there. I want to see that," 78-year-old Alberta Currie, a Black woman from Hope Mills in North Carolina, told a reporter in 2013.¹¹⁵ At the time, the Republican-controlled legislature of North Carolina had recently passed a law, SL 2013-381 (also referred to as House Bill 589, before it was amended and passed in the NC Senate),¹¹⁶ aimed at restricting the ability of people of color to vote. In the phrasing used by the U.S. Court of Appeals for the Fourth Circuit, "we can only conclude that the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent".¹¹⁷

All four of the principal lawmakers who sponsored the bill in the North Carolina Legislature have been involved in ALEC, three of them as active members of ALEC Task Forces.¹¹⁸

The "challenged provisions" of the new law, "required in-person voters to show certain photo IDs, beginning in 2016, which African Americans disproportionately lacked, and eliminated or reduced registration and voting access tools that African Americans disproportionately used."¹¹⁹

One of those "voting access tools" was early voting. North Carolina's law cut the amount of time available for early voting, from 17 days to 10 days, and required all voters to provide one of a group of state-issued forms of ID prior to voting. Early voting is particularly popular among rural Black voters in North Carolina. Albert Currie and the members of her small church in Hope Mills relied on her community church's effort to provide transport to the voting booth on the first Sunday of early voting. As the pastor of the New Oxley Hill Baptist Church in Merry Hill, N.C. reported, "many of these persons don't have cars. They can't afford automobiles."120 Elaborating on the objective of the North Carolina legislature to restrict early voting by a week, longtime Republican consultant Carter Wrenn told the Washington Post, "of course it's political. Why else would you do it?... Look, if African Americans voted overwhelmingly Republican, they would have kept early voting right where it was."121 An-







other Republican official also provided insight into the intent behind the voter ID feature of the law. Don Yelton, Republican precinct chair, stated that this requirement of the law would "disenfranchise some of [Democrats'] special voting blocks.... That within itself is the reason for the photo voter ID. Period. End of discussion."¹²²

The U.S. Court of Appeals for the Fourth Circuit, in finding that the law was specifically designed to "target African Americans with almost surgical precision," cited the requests Republican officials had made of the North Carolina elections board in the months leading up to the passage of the bill through the legislature:

"Prior to and during the limited debate on the expanded omnibus bill, members of the General Assembly requested and received a breakdown by race of DMV-issued ID ownership, absentee voting, early voting, same-day registration, and provisional voting (which includes out-of-precinct voting). This data revealed that African Americans disproportionately used early voting, sameday registration, and out-of-precinct voting, and disproportionately lacked DMV-issued ID. Not only that, it also revealed that African Americans did not disproportionately use absentee voting; whites did. SL 2013-381 drastically restricted all of these other forms of access to the franchise, but exempted absentee voting from the photo ID requirement. In sum, relying on this racial data, the General Assembly enacted legislation restricting all — and only practices disproportionately used by African Americans.¹²³

The targeting of African Americans that took place in North Carolina has happened elsewhere. In 2011, Texas passed a voter ID law, S.B. 14, which required voters to show one of

six forms of government-issued photo identification in order to vote: a state driver's license or ID card, a concealed handgun license, a U.S. passport, a military ID card, or a U.S. citizenship certificate with a photo. A study by political scientists Eitan Hersh and Stephen Ansolabehere found that "white registered voters are significantly more likely to possess a voter ID than African-American or Hispanic voters."¹²⁴ Commenting to a Tufts University magazine about the study, Hersh noted that "in

"...white registered voters are significantly more likely to possess a voter ID than African-American or Hispanic voters."

the last decade, states have been changing rules about registration, early voting, and voter ID.... Voter ID is particularly controversial, because some of these laws seem to have been passed into law with a discriminatory intent."¹²⁵ Hersh has served as an expert witness for the Department of Justice in litigation filed to challenge S.B. 14. Similarly, a 2018 study by Phoebe Henninger, Marc Meredith, and Michael Morse found that, based on data from Michigan, "non-white voters are between 2.5 and 6 times more likely than white voters to lack photo ID."¹²⁶

Anti-Boycott, Divestment, and Sanctions Bills

The Origin

In 2005, as part of the justice movement for Palestinian liberation and in light of a counterproductive peace process, Palestinian civil society launched a call for global solidarity



Dr. Angela Davis, author of "Freedom is a Constant Struggle: Ferguson, Palestine, and the Foundations of a Movement" lectures at Columbia University in 2014.

to pressure the state of Israel to comply with international law and its human rights obligations to Palestinians. Hundreds of Palestinian organizations, individuals, and political parties called on the international community to commit to broad boycotts, divestment initiatives , embargoes, and sanctions (similar to those applied to South Africa during the apartheid era) to be levied against Israel "for the sake of justice and genuine peace."¹²⁷

The call for boycott, divestment, and sanctions (BDS) urged the international community to maintain this pressure until Israel meets its obligations under international law by "1. Ending its occupation and colonization of all Arab lands and dismantling the [Separation] Wall; 2. Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and 3. Respecting, protecting and promoting the rights of Palestinian refugees to return

to their homes and properties as stipulated in UN resolution 194."

In the intervening decade, the international solidarity movement for Palestinian rights has grown exponentially, drawing particular strength from student organizers on college campuses across the country.¹²⁸ The growth of the movement for justice in Palestine has also coincided with a renewed commitment across social justice struggles to the praxis of solidarity and what Dr. Angela Davis calls the "indivisibility of justice."¹²⁹ In response to this surge in activism and organizing, state and local governments across the United States have responded by cracking down on the right to protest and boycott Israel's policies, as well as to speak openly about Palestinian human rights.¹³⁰ Many such measures mention the boycott of Israel and the BDS movement by name.

In May 2015, the state legislature of Illinois broke ground when it unanimously passed the first state law to use the machinery of government to explicitly punish boycotts in support of Palestinian rights. The law established a blacklist of foreign companies that engage in a boycott of Israel, and divested public employees' pension funds from those companies.^{131,132} Governor Bruce Rauner signed the bill into law in July of that year.

At the time, it was widely covered in the media that the Jewish United Fund (JUF) was central to generating political support for the bill.¹³³ In its own statement, JUF noted that its Associate Vice President for Government Affairs, Suzanne Strassberger, "worked closely with the sponsors in Springfield [the state capital of Illinois] to move the legislation forward," and, "in addition to lobbying in Springfield, JUF helped mobilize voter outreach to legislators."¹³⁴ The support was acknowledged and appreciated by Governor Rauner's political aides: "JUF played a critical role in the passage of this important legislation," said Richard Goldberg, the governor's deputy chief of staff for legislative affairs, who noted that the governor appreciated "JUF's strong partnership in combating BDS."¹³⁵ The JUF president added, "We anticipate that this legislation will become a model for similar action in many other states."

In the following months, many more state legislatures followed suit, drawing from a set of identical tactics to retaliate against business entities that engaged in the boycott of Israel. In

March 2016, Florida Governor Rick Scott signed into law a measure both divesting public pensions from, and prohibiting public entities from entering into certain contracts with, companies that boycott Israel, in addition to creating a publicly available blacklist.¹³⁶ That same month, the governor of Colorado signed a law divesting public pensions from companies that boycott Israel.¹³⁷ Also in March 2016, the governor of Arizona signed into law a measure divesting public pensions from companies that boycott Israel and prohibiting public entities from entering into contracts with such companies.¹³⁸

Later that year, the Ohio state legislature also prohibited public entities from entering into contracts with companies that boycott Israel.¹³⁹ The Indiana state legislature passed – and then-Governor Mike Pence signed into law – a provision prohibiting public entities from doing business with companies that boycott Israel and also creating a blacklist.

By April 2019, according to Palestine Legal, 27 states have anti-boycott laws, including five states where governors issued executive orders.¹⁴⁰ Since 2014, more than 100 measures targeting boycotts and advocacy for Palestinian rights



Rick Scott, former Florida Governor now Senator, signed an anti-boycott measure into law in March 2016.

have been introduced in state and local legislatures across the country, as well as in the U.S. Congress.¹⁴¹

In March 2018 the Florida legislature amended a comprehensive anti-BDS bill it passed in 2016, to broaden its scope to apply to all contracts (not just those above \$1 million, as had been the case previously).¹⁴² A different May 2019 law deployed a new tactic to silence critics of Israel, redefining anti-discrimination to include antisemitism. While the 2019 law rightly adds religion as a protected category under Florida's public education anti-discrimination law, it goes on to define antisemitism as virtually any criticism of Israel, and requires public education institutions to use that definition when investigating allegations of antisemitism. ¹⁴³ A similar measure was written into law in South Carolina in May 2018.¹⁴⁴

The Role of ALEC

The Center for Media and Democracy has revealed that two anti-BDS measures were introduced as potential ALEC model legislation at an annual ALEC summit in December 2015: "Resolution on Countering the BDS movement" and the "Protection and Enforcement against the Commercial Exclusion of Israel Act."¹⁴⁵ According to ALEC's website, the resolution was formally introduced as model legislation during the annual ALEC conference held the following July.¹⁴⁶ Reports linked Wisconsin State Senator and ALEC national chairwoman Leah Vukmir to the model legislation; she had written her own alarmist article on the BDS movement on ALEC's online blog just weeks earlier, calling it "economic terrorism." ¹⁴⁷

The language of the model legislation is not publicly available. However, the bill's summary makes clear that it seeks to retaliate against the BDS movement in exactly the same way as the spate of anti-BDS bills that emerged several months later in state legislatures across the country. The goal of the bill, according to ALEC, is to "to create disincentives to engaging in . .

. boycott activities ... [that have] the intention of creating significant economic harm to Israeli or Jewish entities by exerting coercive economic pressure on those doing business with them."148

Notably, the primary group collaborating with ALEC to promote anti-BDS legislation was a right-wing Christian evangelical organization called the American Center for Law and Justice (ACLJ), founded by the tele-evangelist Pat Robertson in 1990. For decades, although increasingly so in recent years, some of the most strident supporters of Israel and Zionism in the United States have been Christian evangelicals like Robertson, who espouse a fundamenalist philosophy of Christian Zionism.¹⁴⁹



Jav Sekulow, President Trump's personal attorney, is also the chief counsel of the ACLJ, a right-wing Christian evangelical organization advancing anti-boycott legislation.

Today, ACLJ, which is closely associated with Jay Sekulow, President Trump's personal attorney, is a religious 501(c)(3) tax-exempt organization with a 2016 budget of over \$53 million. ACLJ has worked behind the scenes with ALEC to develop and help push for the adoption of anti-BDS legislation, including by presenting on the legislation to ALEC lawmakers at its conferences.¹⁵⁰

In many of the 27 states that have adopted anti-BDS measures, the main sponsors of those bills have been closely with ALEC. In Georgia, SB327 was co-sponsored by state Senator Judson Hill, who was named ALEC 'Legislator of the Year' just a few years earlier.¹⁵¹ In Tennessee, SB1250 was introduced by state Senator Dolores Gresham, who has served on ALEC's Education Task Force.¹⁵² Similarly, in Indiana, HB1378 was authored by Representative Brian Bosma, who has served ALEC as a member of its Energy, Environment and Agriculture Task Force¹⁵³ and its Civil Justice Task Force.¹⁵⁴

And two years after introducing ALEC to anti-BDS legislation as the group's national chairwoman, Sen. Leah Vukmir introduced it to her own state legislature in Wisconsin in late 2017. The bill, co-authored by Vukmir, was signed into law in April 2018.¹⁵⁵ The Wisconsin bill, adopted as 2017 Act 248, prohibits all public entities from doing business with any entities that boycott Israel.

A recent Guardian report revealed ALEC's role in coordinating an upcoming dissemination of bills seeking to quell criticism of Israel in U.S. public schools and universities by labeling it as "antisemitic" or "discrimi-



Protesters in Ferguson Missouri take part in the 2014 Palestine contingent of "Ferguson October."

natory." E-mails obtained by the *Guardian* show that Florida state Representative Randy Fine, who sponsored Florida's own legislation, presented on his recent legislative accomplishment at ALEC's annual conference held in August 2019. Fine was eager for the meeting's attendees, which included state lawmakers from South Carolina, North Carolina, Arkansas, Kansas, and Oklahoma, to coordinate their own state legislative advocacy with the Israeli-American Coalition for Action, which he praised for supporting the legislative push in his own state.¹⁵⁶

Responding to that email, a representative of the group boasted that their legal team had "refined [the bill] into a model that can be brought elsewhere," and encouraged members to contact them or ALEC National Chairman Rep. Alan Clemmons of South Carolina for "policy support."¹⁵⁷

Anti-BDS Laws' Impact on People of Color

While it is clear that anti-BDS laws are a direct attack on the constitutionally-protected First Amendment right to boycott,¹⁵⁸ they are also just one tactic in a long legacy of attacks on the rights of Palestinians. The movement for Palestinian rights is broad and diverse, with supporters from all sectors of society. While the laws target Palestinian rights advocates writ large, Arab-AmeriAnti-BDS laws chill, punish, or attempt to punish speakers supporting Palestinian rights... designed to silence expressive advocacy that challenges the injustices of Israeli state policy

can, Black, Brown, and Indigenous people who have been central to the growing cross-movement defense of the rights of Palestinians have also clearly been impacted.

As in other struggles for justice, it is people of color that are disproportionately affected by backlash that movements face. For example, the Israeli government deems Black-Palestinian solidarity so threatening that it has attempted to implement a strategy to expressly target the Movement for Black Lives' support for Palestinian rights.¹⁵⁹

Students of color who support Palestinian rights have also found themselves singled out and targeted by right-wing extremistss like David Horowitz. He has been referred to by the Southern Poverty Law Center as "one of America's most dangerous hatemongers" and "the godfather of the modern anti-Muslim movement". Like other Islamophobic right-wing commentators, Horowitz frequently ties his anti-Muslim and anti-Black diatribes together with his hatred of Palestinians.¹⁶⁰ Horowitz has used posters and speeches to target students and professors of color who support Palestinian rights.¹⁶¹ ALEC hosted Horowitz at its annual meeting in New Orleans in 2018. During a breakfast session, Horowitz claimed that "at the K-12 level, school curricula have been turned over to racist organizations like Black Lives Matter and terrorist organizations like the Muslim Brotherhood."¹⁶²

Online campaigns like those run on the Canary Mission website deliberately smear the reputations of people who advocate for the rights of Palestinians, and they overwhelming focus on people of color. The Palestinian rights advocacy organisation, Jewish Voice for Peace, reported on the shadowy activities of Canary Mission and found that "[t]he students targeted by Canary Mission are overwhelmingly Palestinian, Arab, Muslim and/or students of color". The report continued, "in a national climate marked by rising Islamophobia, anti-Arab

and anti-black racism, Canary Mission's smear campaign only adds fuel to the fire, exposing already marginalized campus communities to additional surveillance, harassment and even physical danger.^{"163}

These and many other examples of the widespread attack on Palestinian rights advocates and their allies are compounded by the wave of anti-BDS laws that has occured in recent years. The analysis of the impact of these laws must be seen together with this wider animus directed toward Muslims and people of Arab descent, particularly Palestinians and Palestinian-Americans.

Consider the impact of a 2017 Texas law, sponsored by Phil King, who was National Chair of ALEC in 2015 and is a member of the Board of Directors.¹⁶⁴ The 2017 law stipulated that "a governmental entity may not enter into a contract with a company for goods or services unless the contract contains a written verification from the company that it: (1) does not boycott Israel; and (2) will not boycott Israel during the term of the contract." A Palestinian-American speech language pathologist, who was born in Austria but has lived in the U.S. for thirty years, has worked in Austin suburban schools serving Arabic-speaking students since 2009. She was unable to renew her contract with the school district because she could not, in good conscience, sign the required certification that she does not and will not boycott Israel.¹⁶⁵ Speaking in a media interview, Ms. Amawi said, "You know I have to set an example for my kids. We have got to stand up for justice, and what's right and equal opportunity for everybody... so I could not sign it. I was forced to resign from my job because I will not sign it."166 Zachary Abdelhadi, a student at Texas State University, is another Palestinian-American impacted by the Texas law. Because he would not submit to the law, he was prevented from judging high school debate tournaments for the Lewisville Independent School District. Similarly, Obinna Dennar, a Ph.D History student, had to turn down payment for judging a debate in the Klein independent school district.

These anti-BDS laws chill, punish, or attempt to punish speakers supporting Palestinian rights. They are part of a tapestry of laws and practices, of which the Texas anti-BDS Act is a central piece, which are designed to silence expressive advocacy that challenges the injustices of Israeli state policy. Beyond the attack that anti-BDS laws have on people of color, the broad nature of how anti-BDS laws are applied can have devastating consequences. For example, based on a mistaken application of the Texas anti-boycott law, hurricane victims in Dickinson, Texas were required to pledge not to boycott Israel as a condition for receiving relief aid.¹⁶⁷

While anti-BDS laws impact the everyday lives of the people of color, and their allies, who take a stand to defend the rights of Palestinians, they exist within this broader social and political context. These laws are only one component of the broader attack on the movement for Palestinian rights that undermines the rights of all people to boycott not only in support of the rights of Palestinians, but other social justice issues as well.

Critical Infrastructure Bills

The Origin

In August 2016, Indigenous and allied protesters began an



2016: Standing Rock Sioux Nation resists construction of **Dakota Access Pipeline** through land covered by the 1868 Fort Laramie Treaty.

The original route was changed to safeguard water supplies for a nearby majority-white town. effort to prevent construction of the Dakota Access Pipeline (DAPL) that soon evolved into a national movement referred to as #NoDAPL. Historian and Indigenous activist Nick Estes documented his involvement with #NoDAPL in his 2019 book *Our History Is the Future*, which contains, among many other important stories, details of the motivations and significance of this movement:

This was my fourth and final trip to Oceti Sakowin Camp, the largest of several camps that existed at the confluence of the Cannonball and Missouri Rivers, north of the Standing Rock Indian Reservation, from April 2016 to February 2017. Initially, the camps had been established to block construction of Energy Transfer Partners' \$3.8 billion Dakota Access Pipeline (DAPL), a 1,712-mile oil pipeline that cut through unceded territory of the 1868 Fort Laramie Treaty and crossed under Mni Sose (the Missouri River) immediately upstream from Standing Rock, threatening the reservation's water supply. This was not just about Standing Rock water: The pipeline crossed upriver from the Fort Berthold Indian Reservation on the Missouri River, transporting oil extracted from that reservation's booming fracking industry. It cut under the Mississippi River at the Iowa-Illinois border, where a coalition of Indigenous peoples and white farmers, ranchers, and environmentalists in Iowa opposed it. And it crossed four states – North Dakota, South Dakota, Iowa, and Illinois, But it was Standing Rock and allied Indigenous nations, including Fort Berthold, who had put up the most intense resistance.... The encampments were about more than stopping a pipeline. Scattered and separated during invasion, the long-awaited reunification of all seven nations of Dakota-, Nakota-, and Lakota-speaking peoples hadn't occurred in more than a hundred years, or at least seven generations.168

The movement was quickly misrepresented by Republicans, law enforcement officials, and right-wing commentators who supported a quick and uninterrupted construction of the 1,172-mile-long underground oil pipeline. State-level legislators across the country harnessed the backlash as justification for new laws that criminalize protest activity with extreme penalties.¹⁶⁹

On Feb 22nd 2017, the chair of the Oklahoma House of Representatives Committee on

Criminal Justice and Corrections, Rep. Scott Biggs, introduced a critical infrastructure bill, HB 1123, to the committee, expressly stating in response to a question by another committee member, "Yes, [the Dakota Access Pipeline protests] are the main reason behind this."¹⁷⁰ During debate of the bill in the committee session, Rep. Biggs invited members to join oil and gas executives for a committee briefing on what took place in North Dakota.¹⁷¹



Dakota Access Pipeline protests at Standing Rock

The law created a new set of criminal offenses for trespassing on property containing "a critical infrastructure facility," a term defined broadly by the bill as any of 16 mostly energy-related industrial manufacturing facilities, or, in a clear allusion to the Dakota Access Pipeline, "[a]ny aboveground portion of an oil, gas, hazardous liquid or chemical pipeline, tank, railroad facility or other storage facility" marked as private property.¹⁷² The offenses carried a tremendous penalty: entering property that has on it a critical infrastructure facility could result in a fine of \$1,000 and/or six months in jail, and causing damage on such property could lead to 10 years in prison and a fine of up to \$100,000.¹⁷³

House Bill 1123 was signed into law by Oklahoma Governor Fallin on May 3, 2017. Less than two weeks later, Governor Fallin signed another bill into law, HB 2128, to ramp up financial



liability for individuals convicted of trespassing and for others who conspired with them.¹⁷⁴

The Role of ALEC

A few months after Oklahoma passed HB 1123 and HB 2128 into law, ALEC's Energy, Environment and Agriculture Task Force drafted what it called the "Critical Infrastructure Protection Act."¹⁷⁵ ALEC introduced it as a model bill soon after, at its States and Nation Policy Summit in Nashville, December 7-9, 2017. In a letter sent by six fossil fuel industry associations, lobbyists, and corporations to state lawmakers on December 7, 2017, timed to coincide with ALEC's meeting, the groups called on state lawmakers to support ALEC's new Critical Infrastructure legislation, arguing it would hold individuals and organizations accountable for tampering with or disrupting operations. The fossil fuel groups added that they looked "forward to working with you as you continue to address this growing problem in your state."¹⁷⁶



A few weeks later, Grant Kidwell, director of ALEC's Energy,

Environment and Agriculture Task Force, wrote an article for ALEC's website. In the piece, Kidwell specifically cited pipeline protestors' activities against Energy Transfer Partners' Dakota Access Pipeline as justification for the need for critical infrastructure laws. He also drew an explicit connection between Oklahoma's laws and the ALEC model legislation:

States have begun to take action in response to this disturbing trend of trespassing, vandalism, and damage to critical infrastructure sites. In 2017, Oklahoma enacted two new laws designed to hold individuals and conspiring organizations criminally and civilly liable for trespassing or tampering with critical infrastructure sites and structures. Members of the American Legislative Exchange Council drew on these two laws for the crafting of a new piece of model policy, the Critical Infrastructure Protection Act.¹⁷⁷

On March 26, 2018, Major Thibaut, Jr., an ALEC-affiliated Democratic Louisiana state leg-

islator,¹⁷⁸ introduced House Bill 727 to the state's House of Representatives. Justifying the need to amend the critical infrastructure bill, Thibaut told a reporter, "I saw what happened in parts of the country like North Dakota. Oklahoma has some legislation, and this is kind of modeled after that."179 The bill was introduced soon after protesters in Louisiana, inspired by earlier protests at Standing Rock, had established a campaign to halt construction of the 163-mile-long Bayou Bridge oil pipeline by two ALEC-affiliated corporations,¹⁸⁰ Energy Transfer Partners and Phillips 66.¹⁸¹ Thibaut may also have had in mind that Phillips 66 (and the company it was formerly owned by, ConocoPhillips¹⁸²) had made dona-



No Bayou Bridge protesters stage direct action to stop construction along the pipeline route, 2018.

tions to his political campaign for several years, including the year just prior to his bill passing into law.¹⁸³ His close ties to the companies building the critical infrastructure facilities is part of a much larger trend: the National Institute on Money in Politics and Greenpeace have revealed that since 2011, 65 elected representatives who signed on as co-authors of the Louisiana Senate and House critical infrastructure bills received \$54,851 in contributions from the two companies building the Bayou Bridge Pipeline.¹⁸⁴

In 2019, just months after ALEC adopted Oklahoma's bill as model legislation, North Dakota, South Dakota, Texas, and Tennessee all passed critical infrastructure laws. In Missouri, a critical infrastructure bill has passed both houses of government and is awaiting approval by the governor. There are also critical infrastructure bills pending in Idaho, Illinois, Kentucky, Minnesota, and Ohio.¹⁸⁵



The Center for Media and Democracy has also documented ALEC affiliations for sponsors of the bills passed into law in other states, including North Dakota (Sen. Janne Myrdal, Rep. Chuck Damschen, and Rep. Jim Schmidt),¹⁸⁶ South Dakota (Sen. Kris Langer, Sen. Ryan Maher, committee Vice Chair Sen. Jenna Netherton, and Sen. Al Novstrup)¹⁸⁷ and Tennessee (Sen. Frank Nicely).¹⁸⁸ In Texas, two of the three sponsors of the state's critical infrastructure bill, passed in spring 2019, have documented ALEC ties. ¹⁸⁹

Critical Infrastructure Laws' Impact on People of Color

As illustrated above, the Louisiana law emerged in the wake of the #NoDAPL movement, as part of a coordinated national effort by fossil fuel industry interests, supported by ALEC, to criminalize environmental and Indigenous protests against their infrastructure projects. It is therefore no coincidence that, just days after it was enacted, the Louisiana law was invoked

by a private security company working in tandem with local law enforcement at the behest of the private corporations building the Bayou Bridge pipeline.¹⁹⁰

Anne White Hat, one of the Indigenous women who have been central to the leadership of the campaign to stop construction of the Bayou Bridge Pipeline in Louisiana, said of the law:

The goal of this unconstitutional law is to further corporate interests and silence Indigenous and non-Indigenous communities that take a stand for the rights of our Mother Earth that we human beings depend upon for our existence. While our leadership ignores the growing climate chaos, ALEC and its "Big Oil" partners can try to leverage America's pay-to-play politics to silence us – but we will fight this on the front lines and in the courts.¹⁹¹

Meg Logue, a local activist with 350 New Orleans, said of the law, "ALEC-inspired HB 727

was a thinly veiled attempt to equate the peaceful, prayerful resistance of water protectors to terrorism, and hyper-criminalize our work accordingly. Our legislators jeopardize our democracy by bending toward the priorities of corporations while undermining the people's right to self-determination and justice."¹⁹²

As detailed in Section 3, the initial draft of House Bill 727 contained amendments to Louisiana's critical infrastructure law that were even more draconian than either the Oklahoma or ALEC model legislation. For example, HB 727 included a far-reaching conspiracy offense which provided that if two or more persons conspired to commit unauthorized entry (heretofore a misdemeanor trespass), even without actually committing the trespass, they could be imprisoned with or without hard labor for up to five years and fined up to \$10,000.¹⁹³



As the bill progressed through the House and Senate in Louisiana, opponents of the bill began to raise serious doubts about it. Another climate activist with 350 New Orleans, Alicia Cooke, told a reporter covering the situation, "How do you prove that someone is conspiring to trespass on property? Versus conspiring to gather *near* property?"¹⁹⁴ The many concerns raised by opponents of the bill, particularly the conspiracy component, resulted in this provision, and others, being removed before passage.

Unlike the Oklahoma law, HB 727 contains no outer bounds to its definition of pipelines, and thus includes all portions of the 125,000 miles of pipelines in the state, most of which run underground.¹⁹⁵ According to a legal challenge to HB 727, filed by the Center for Constitutional Rights in support of Anne



#BlockALEC Protesters outside ALEC Annual Meeting in Austin, TX 2019 (L-R) Jennifer Falcon, Anne White Hat, Meg Logue.

White Hat, 350 New Orleans, and others, the open-ended and far-reaching definition not only lends itself to misuse by law enforcement as a pretext for targeting a wide range of protest activity, but renders the law unconstitutionally vague and overbroad.¹⁹⁶

White Hat, who is also the lead plaintiff in the aforementioned case, was arrested on September 18, 2018, after leading a prayer ceremony at a boat launch near St. Martinville, Louisiana. She was charged with two felony counts under the critical in-frastructure law for unauthorized entry that allegedly occurred on September 3, 2018, near a pipeline construction site in the Atchafalaya Basin. As outlined in the court filing:

White Hat had been present on the property in question as a Water Protector with the permission of co-owners.

CHANGES IN THE NORTH DAKOTA LAW CARRY SERIOUS PENALTIES

IN IAII

Max penalty for individuals "damaging", "interfering"

or "tampering" with <u>critic</u>al infrastructure

AND Max penalty for organizations "conspiring" with an individua to "domose" "interver"

"conspiring" with an individual to "damage", "interfere" or "tamper" with critical infrastructure

She engaged in non-violent protest against and monitoring of the pipeline project and was trying to raise awareness about the fact that the pipeline was being constructed on the property illegally, a fact later confirmed as the company was found by a Louisiana court to have been trespassing at the time. White Hat is currently facing the possibility of prosecution for the two felony charges that are subject to a combined 10 years imprisonment. The pending charges have affected her life and her ability to engage in further demonstrations.¹⁹⁷

So far, more than a dozen arrests have been made of peaceful protesters, as well as a journalist covering the events, who were charged with felonies for acts that would have been charged as misdemeanor trespass before August 1, 2018 (and only if those arrested did not have permission or a legal right to remain on the property in the first place). They now face the possibility of prosecution and, if found guilty, up to five years in prison (per offense) and heavy fines. Many of these arrests took place on property upon which a court in December 2018 ruled that the pipeline company itself was trespassing,¹⁹⁸ while the protesters had obtained permission of co-owners of the property to be there.



Endnotes

75 See also initiatives like pushing for passage of Anti-Sharia bills, which, while not covered in this report, are affiliated with ALEC. These laws, in the words of the Southern Poverty Law Center, are "legally redundant efforts that foment a sensational fear of Islam and American Muslims subverting American law." See further at: Hélène Barthélemy, "Anti-Muslim fanatic David Horowitz speaks at influential American Legislative Exchange Council," February 5, 2018, https://www.splcenter.org/hatewatch/2018/02/05/anti-sharia-law-bills-united-states.

76 Ed Pilkington, "Revealed: rightwing push to ban criticism of Israel on US campuses," *The Guardian*, October 17, 2019, https://www.theguardian.com/us-news/2019/oct/16/conservative-activists-want-to-outlaw-antisemitism-in-public-education-why-is-that-a-bad-thing.

77 Weyrich infamously told a gathering of conservative evangelicals, "Now many of our Christians have what I call the goo-goo syndrome – good government. They want everybody to vote. I don't want everybody to vote. Elections are not won by a majority of people, they never have been from the beginning of our country and they are not now. As a matter of fact, our leverage in the elections quite candidly goes up as the voting populace goes down." Accessible at: https://www.youtube.com/watch?v=8GBAsFwPglw.

78 Lifeway Research, "Evangelical Attitudes Towards Israel Research Study: Evangelical Attitudes Towards Israel and the Peace Process," 2017, available at: http://lifewayresearch.com/wp-content/uploads/2017/12/Evangelical-Attitudes-Toward-Israel-Research-Study-Report. pdf.

79 Giffords Law Center to Prevent Gun Violence, "Stand Your Ground' Laws," webpage, https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/ stand-your-ground-laws/#state; 30 states have some version of a "stand your ground" or "castle doctrine" law in effect, but there are differences in how the law operates depending on where the shooter is at the time (i.e. in a motor vehicle).

80 Hussein and Webber, "Florida's 'Stand Your Ground' Statute: Self-Defense, Justifiable Use of Force, and Prosecutorial Immunity," subsection 3 [emphasis added], http://www.husseinandwebber.com/case-work/criminal-defense-articles/floridas-stand-ground-statute/.

81 Joe Strupp, Media Matters for America, "Former NRA President: We Helped Draft Florida's 'Stand Your Ground' Law," March 27, 2012, https://www.mediamatters.org/blog/2012/03/27/former-nra-president-we-helped-draft-floridas-s/185254.

82 Mike Spies, "The N.R.A. Lobbyist Behind Florida's Pro-Gun Policies," *The New Yorker*, February 23, 2018, https://www.newyorker.com/magazine/2018/03/05/the-nra-lobbyist-behind-floridas-pro-gun-policies.

83 Joe Strupp, Media Matters for America, "Former NRA President: We Helped Draft Florida's 'Stand Your Ground' Law," March 27, 2012, https://www. mediamatters.org/blog/2012/03/27/former-nra-president-we-helped-draft-floridas-s/18525.

84 John Nichols, How ALEC Took Florida's 'License to Kill' Law National, *The Nation*, March 22, 2012, https://www.thenation.com/article/how-alec-took-floridas-license-kill-law-national/.

85 National Rifle Association – Institute for Legislative Action, "NRA Presents ALEC Model Legislation in Grapevine, Texas," press release, August 12, 2005, https://www.prwatch.org/files/NRA_2005.png.

See also a subsequent ALEC public statement supporting the NRA's assertion that "Florida's Stand Your Ground law was the basis for the American Legislative Exchange Council's model legislation": American Legislative Exchange Council, "ALEC Statement on 'Stand Your Ground' Legislation," March 26, 2012, https://www.alec.org/press-release/alec-statement-on-stand-your-ground-legislation-32612/.

87 Calvin Sloan, People for the American Way, "ALEC: The Hidden Player Behind 'Stand Your Ground' Laws," March 21, 2012, http://www.pfaw.org/blogposts/alec-the-hidden-player-behind-stand-your-ground-laws/.

88 Ibid.

89 Violence Policy Center, "Blood Money: How the Gun Industry Bankrolls the NRA," April 2011, 1, http://www.vpc.org/studies/bloodmoney.pdf.

90 Ibid.

91 Everytown for Gun Safety, "Shoot First Appendix," 2015, https://everytownresearch.org/wp-content/uploads/2015/06/ShootFirst-Appendix2.pdf.

92 National Conference of State Legislatures, "Self-Defense and 'Stand Your Ground," July 27, 2018, http://www.ncsl.org/research/civil-and-criminal-justice/ self-defense-and-stand-your-ground.aspx, Alabama 2006, Florida 2005, Georgia 2006, Idaho 2018, Kansas 2010, Kentucky 2006, Louisiana 2006, Oklahoma 2006, Pennsylvania 2011, and South Carolina 2006.

93 CNN, "Trayvon Martin Shooting Fast Facts," February 28, 2019, https://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html.

94 Madison Gray, "Trayvon Martin's Killing: Was the Motive Self-Defense or Racism?" Time, March 19, 2012,

http://newsfeed.time.com/2012/03/19/trayvon-martins-killing-was-the-motive-self-defense-or-racism/#ixzz1pmWCxXE4.

95 Igor Volsky, "7 Mind Blowing Moments From Zimmerman Juror B37's First Interview," *Think Progress*, July 16, 2013, https://web.archive.org/ web/20130719114222/http://thinkprogress.org/politics/2013/07/16/2306901/7-mind-blowing-moments-from-zimmerman-juror-b37s-first-interview/?mobile=nc.

96 Pinker S. The Better Angels of Our Nature: A History of Violence and Humanity. London: Penguin; 2012.

97 David Humphreys, Antonio Gasparrini and Douglas Wiebe, 'Evaluating the Impact of Florida's "Stand Your Ground" Self-defense Law on Homicide and Suicide by Firearm: An Interrupted time Series Study', *Journal of the American Medical Association, Internal Medicine*, January 2017, https://jamanetwork.com/ journals/jamainternalmedicine/fullarticle/2582988#ioi160090r32.

98 John K. Roman, "Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data," *Urban Institute*, July 2013, 9, https://www.urban.org/sites/default/files/publication/23856/412873-Race-Justifiable-Homicide-and-Stand-Your-Ground-Laws.PDF.

99 Ibid, 9.

100 Franklin D. Roosevelt, "Campaign dinner address of Franklin Delano Roosevelt (the Fala speech)," September 23, 1944, https://www.wyzant.com/resources/lessons/history/hpol/fdr/fala/.

101 Stefan Lovgren, "Are Electronic Voting Machines Reliable?" *National Geographic News*, November 1, 2004, https://web.archive.org/web/20050226083314/http://news.nationalgeographic.com/news/2004/11/1101_041101_election_voting.html.

102 Help America Vote Act of 2002, H.R. 3295 (107th U.S. Cong.), January 23, 2002, https://www.eac.gov/assets/1/6/HAVA41.PDF.

103 Center for Democracy and Election Management, American University, "Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform," September 2005, https://www.eac.gov/assets/1/6/Exhibit%20M.PDF.

104 Ibid.

105 Commissioner Spencer Overton, "Dissenting Statement" in response to report by Commission on Federal Election Reform, November 2005, https://web. archive.org/web/20051123074225/http://www.carterbakerdissent.com/.

106 R.G. Ratcliffe, "Voter fraud in Texas: 'It's a lie." *Houston Chronicle*, May 17, 2007, https://blog.chron.com/texaspolitics/2007/05/voter-fraud-in-texas-its-a-lie/.

107 Adam Gitlin and Wendy R. Weiser, Brennan Center, "The Justice Department's Voter Fraud Scandal: Lessons," Brennan Center for Justice at New York University School of Law, 2017, https://www.brennancenter.org/sites/default/files/publications/Justice_Department_Voter_Fraud_Scandal_Lessons.pdf; Eric Lipton and Ian Urbina, "In 5-Year Effort, Scant Evidence of Voter Fraud," *The New York Times*, April 12, 2007, https://www.nytimes.com/2007/04/12/washington/ 12fraud.html.

108 Stephen Elzinga, "The Challenge of Photo ID: Can Legislation Prevent Election Fraud without Disenfranchising Voters?" *Inside ALEC*, June 2009, 14, https://images2.americanprogress.org/campus/web/Inside_alec_June09.pdf.

109 Center for Media and Democracy, "Taxpayer and Citizen Protection Act," annotated by ALEC Exposed, https://www.alecexposed.org/w/images/f/f6/7K12-Taxpayer_and_Citizen_Protection_Act_Exposed.pdf.

110 Center for Media and Democracy, "Voter ID Act," annotated by ALEC Exposed, https://www.alecexposed.org/w/images/d/d9/7G16-VOTER_ID_ACT_Exposed.pdf.

111 Non-strict means voters can still cast a ballot without ID but may need to sign an affidavit, or some other form of verification will suffice. Strict requirement means voters must vote using a provisional ballot and undertake a second step of verification after they vote for it to count. See: Wendy Underhill, National Conference of State Legislators, "Voter Identification Requirements | Voter ID Laws," Janaury 17, 2019,

http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.

112 Mississippi (Senator Joey Fillingane), Kansas (Rep. Steve Brunk, Re.p. Lance Kinzer, Rep. Marvin Kleeb, and Rep. Peggy Mast), South Carolina (Rep. Liston Barfield), Tennessee (Rep. Curry Todd), Texas (Rep. Tom Craddick), and Wisconsin (Rep. Robin Vos, Rep. Scott Fitzgerald). See Tobin Van Ostern, "New Evidence of ALEC Connections in All Successful Voter ID Legislation," *Generation Progress*, September 8, 2011, https://genprogress.org/new-evidence-of-alec-connections-in-all-successful-voter-id-legislatio/ and National Conference of State Legislators, "Voter ID History," May 31, 2017, http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.apx.

113 National Conference of State Legislators, "Voter ID History."

114 Wendy Underhill, National Conference of State Legislators, "Voter Identification Requirements | Voter ID Laws," Janaury 17, 2019, http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.

115 NPR, "In Rural N.C. New Voter ID Law Awakens Some Old Fears," August 16, 2013, https://www.npr.org/2013/08/16/212664895/ in-rural-n-c-new-voter-id-law-awakens-some-old-fears.

116 General Assembly of North Carolina, "Session Law 2013-381, House Bill 589," Session 2013, https://www.ncleg.net/Sessions/2013/Bills/House/PDF/H589v9.pdf.

117 N.C. State Conference of the NAACP v. Patrick McCrory, United States Court of Appeals for the Fourth Circuit, No. 16-1468, 11, http://pdfserver.amlaw.com/nlj/7-29-16%204th%20Circuit%20NAACP%20v%20NC.pdf.

118 General Assembly of North Carolina, Session Law 2013-381, House Bill 589, Session 2013, https://www.ncleg.net/Sessions/2013/Bills/House/PDF/H589v9.pdf.

119 N.C. State Conference of the NAACP v. Patrick McCrory, United States Court of Appeals for the Fourth Circuit, No. 16-1468, 14, http://pdfserver.amlaw.com/nlj/7-29-16%204th%20Circuit%20NAACP%20v%20NC.pdf.

120 Ailsa Chang, In Rural N.C., New Voter ID Law Awakens Some Old Fears, *National Public Radio*, August 16, 2013, https://www.npr.org/2013/08/16/212664895/in-rural-n-c-new-voter-id-law-awakens-some-old-fears.

121 William Wan, "Inside the Republican creation of the North Carolina voting bill dubbed the 'monster' law," September 2, 2016, https:// www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html?utm_term=.931086518879.

122 N.C. State Conference of the NAACP v. Patrick McCrory, United States Court of Appeals for the Fourth Circuit, No. 16-1468, 47, http://pdfserver.amlaw.com/nlj/7-29-16%204th%20Circuit%20NAACP%20v%20NC.pdf.

123 Ibid, 48.

124 Stephen Ansolabehere and Eitan D. Hersh, "ADGN: An Algorithm for Record Linkage Using Address, Date of Birth, Gender, and Name," *Statistics & Public Policy 4*, November 16, 2017,

https://amstat.tandfonline.com/doi/full/10.1080/2330443X.2017.1389620#.XQBYp48pDb2.

125 Taylor McNeil, "Proving Voter ID Law's Discriminating Intent," *Tufts Now*, January 23, 2018, https://now.tufts.edu/articles/proving-voter-id-law-s-discriminating-intent.

126 Phoebe Henninger, Marc Meredith, and Michael Morse, "Who Votes Without Identification? Using Affidavits from Michigan to Learn About the Potential Impact of Strict Photo Voter Identification Laws," July 1, 2018), https://ssrn.com/abstract=3205769.

127 "Palestinian Civil Society Call for BDS," bdsmovement.net, July 9, 2005 https://bdsmovement.net/call.

128 See generally: Palestine Legal and the Center for Constitutional Rights, "The Palestine Exception to Free Speech: A movement under attack in the U.S.," https://ccrjustice.org/the-palestine-exception.

129 Niraj Chokshi, "Angela Davis Says She's 'Stunned' After Award Is Revoked Over Her Views on Israel," *The New York Times*, January 8, 2019,

https://www.nytimes.com/2019/01/08/us/angela-davis-israel-civil-rights-institute.html.

130 See generally: Palestine Legal and the Center for Constitutional Rights, "The Palestine Exception to Free Speech: A movement under attack in the U.S."

131 Illinois Senate Bill 1761, 99th General Assembly, 2015-2016, https://legiscan.com/IL/votes/SB1761/2015; Palestine Legal, "Illinois Governor Signs Anti-BDS Bill Into Law," July 24, 2015, https://palestinelegal.org/news/2015/7/24/illinois-governor-signs-anti-bds-bill-in-to-law?rq=illinois.

132 Ironically/notably, the state mimicked the tactic of "divestment," borrowing one of the three pillars of the BDS movement.

133 JUF News, Jewish United Fund, "Illinois' Anti-BDS legislation draws international news coverage," May 21, 2015, https://www.juf. org/news/local.aspx?id=434560.

134 JUF News, Jewish United Fund, "Illinois Passes Historic Anti-BDS Bill," May 21, 2015, https://www.juf.org/news/local.aspx?id=434561.

135 Ibid.
136 Yair Rosenberg, "South Carolina Passes anti-BDS Bill," *Tablet*, June 5, 2015, https://www.tabletmag.com/scroll/191437/south-carolina-passes-anti-bds-bill.

137 House Bill 16-1284, State of Colorado, Seventieth General Assembly, Second Regular Session, http://www.leg.state.co.us/clics/clic-s2016a/csl.nsf/fsbillcont3/FFEE6B72C4AB699C87257F240063F4A6?open&file=1284_rer.pdf.

138 HB 2617, State of Arizona, House of Representatives, Fifty-Second Legislature, Second Regular Session, 2016, https://www.azleg. gov/legtext/52leg/2r/bills/hb2617p.pdf.

¹³⁹ "Ohio Gov. John Kasign Signs state anti-BDS law," *Jewish Telegraphic Agency*, December 20, 2016, https://www.jta.org/2016/12/20/ united-states/ohio-gov-john-kasich-signs-state-anti-bds-law.

140 See Palestine Legal 'Legislation' webpage. Available at: https://palestinelegal.org/righttoboycott.

141 Ibid.

142 Senate Bill 86, Florida Senate, 2016, https://www.flsenate.gov/Session/Bill/2016/0086. See also Palestine Lega's webpage on the legislation: https://palestinelegal.org/florida.

143 House Bill 741, Florida House of Representatives, 2019, https://www.flsenate.gov/Session/Bill/2019/741/BillText/er/PDF.

144 Ali Younes, "Critics denounce South Carolina's new 'anti-Semitism' law," *Al-Jazeera*, May 16, 2018, https://www.aljazeera.com/ news/2018/05/critics-denounce-south-carolina-anti-semitism-law-180513113108407.html.

145 The original documents have been taken down from ALEC's website, but reference is made to them by the Center for Media and Democracy at: www.sourcewatch.org/index.php/ALEC_Federalism_and_International_Relations_Task_Force. A summary version of the "Draft Shell Model Peace Israel Act – Protection and Enforcement Against the Commercial Exclusion of Israel Act" is available here: https://web. archive.org/web/20160720150615/https://www.alec.org/model-policy/draft-shell-model-peace-israel-act-protection-and-enforcementagainst-the-commercial-exclusion-of-israel-act/.

146 James Briggs, "Mike Pence Among Keynote Speakers During ALEC's Annual Meeting in Indianapolis," *Indianapolis Star*, July 26, 2016, https://www.indystar.com/story/news/2016/07/26/mike-pence-among-keynote-speakers-during-alecs-annual-meeting-indianapolis/87568750/; "Draft Shell Model PEACE Israel Act – Protection and Enforcement Against the Commercial Exclusion of Israel Act," American Legislative Exchange Council, https://web.archive.org/web/20160720150615/https://www.alec.org/model-policy/draft-shellmodel-peace-israel-act-protection-and-enforcement-against-the-commercial-exclusion-of-israel-act/.

147 "ALEC Goes After BDS," *Palestine Square*, July 25, 2016, https://palestinesquare.com/2016/07/25/alec-goes-after-bds/; https:// www.alec.org/article/the-boycott-divestment-and-sanctions-movement/.

148 American Legislative Exchange Council, "Draft Shell Model PEACE Israel Act."

149 Jonathan Allen, "In the Trump Era, evangelicals take center stage on Israel policy," NBC News, April 15, 2019, https://www.nbcnews. com/politics/white-house/trump-era-evangelicals-take-center-stage-israel-policy-n994326.

150 Jeff Ballabon, "Major Legislative Progress Against Anti-Israel BDS at State and Local Level," American Center for Law and Justice, 2016, https://aclj.org/israel/major-legislative-progress-against-anti-israel-bds-at-state-and-local-level.

151 American Legislative Exchange Council, "Sen. Judson Hill Awarded Legislator of the Year by the American Legislative Exchange Council," press release, July 31, 2014, www.alec.org/press-release/sen-judson-hill-awarded-legislator-year-american-legislative-exchange-council.

¹⁵² "ALEC Education Task Force Membership Directory, August 2011, obtained and released by Common Cause, referenced by the Center for Media and Democracy at www.sourcewatch.org/index.php/Tennessee_ALEC_Politicians#cite_note-EDUNOLA-1.

¹⁵³ "ALEC Energy, Environment, and Agriculture Task Force Membership Directory," December 2010, obtained and released by Common Cause, referenced by the Center for Media and Democracy at www.sourcewatch.org/index.php/Indiana_ALEC_Politicians#cite_note-HHS_Letter-2.

"Civil Justice Task Force Membership Directory," August 2011, obtained and released by Common Cause, referenced by the Center for Media and Democracy at www.sourcewatch.org/index.php/Indiana_ALEC_Politicians#cite_note-HHS_Letter-2.

155 Governor Scott Walker, "Governor Walker Reaffirms Support for Israel, Signs Anti-BDS Bill into Law," press release, April 3, 2018, https://web.archive.org/web/20180414205254/https://walker.wi.gov/press-releases/governor-walker-reaffirms-support-israel-signs-anti-bds-bill-law.

156 Ed Pilkington, "Revealed: rightwing push to ban criticism of Israel on US campuses," *The Guardian*, October 17, 2019 https://www. theguardian.com/us-news/2019/oct/16/conservative-activists-want-to-outlaw-antisemitism-in-public-education-why-is-that-a-bad-thing.

157 Ibid.

158 NAACP v. Claiborne Hardware, 458 U.S. 886 (1982): "The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott..." and United States Supreme Court (1966): "[c]riticism of government is at the very center of the constitutionally protected area of free discussion."

159 See The Grey Zone, "Censored Documentary Exposes the Israeli Government's Attacks on Black Lives Matter," September 5, 2018: "The major problem with Israel is with the young generation of the black community — Black Lives Matter starts there,' stated Judith Varnai Shorer, the Israeli consul general in Atlanta, Georgia," https://thegrayzone.com/2018/09/05/censored-documentary-exposes-the-israeli-governments-attack-on-black-lives-matter/; see also Reut Group's "Navigating Intersectional Landscapes: Rules for Jewish Community Professionals" report that fixates on the "threat of intersectionality movements" to Israel, released in June 2019, https://20a1ea9b-cbf6-4da3-88fd-ab21d8ba06cc.filesusr.com/ugd/001a60_f2414f5a7d404b69932f20a2319da618.pdf.

160 Southern Poverty Law Center, "*Intelligence Report -- Godfather*,", May 24, 2014, https://www.splcenter.org/fighting-hate/intelli-gence-report/2014/godfather.

161 Aviva Stahl, "Poster Campaign Calls Brooklyn College Students 'Terrorist Supporters," *The Village Voice*, October 3, 2017, https://www.villagevoice.com/2017/10/03/david-horowitz-is-putting-up-posters-calling-brooklyn-college-students-terrorist-supporters/.

162 Chris Taylor, *The Cap Times*, "Rep.Chris Taylor: ALEC gathering gives platform to hatemongering Horowitz," August 20, 2018, https:// madison.com/ct/opinion/column/rep-chris-taylor-alec-gathering-gives-platform-to-hatemonger-horowitz/article_3002a085-1320-5b70a278-9b935fae106c.html.

163 Jewish Voice for Peace, "Shadowy Website Creates Blacklist of Pro-Palestinian Activists", May 13, 2016, https://jewishvoicefor-peace.org/canary-mission/.

164 American Legislative Exchange Council, "Rep. Phil King," www.alec.org/person/representative-phil-king; Phil King campaign website, www.philking.com/about.

165 Complaint at ¶¶ 4, 27-28, 30, 32-33, *Amawi v. Pflugerville Indep. Sch. Dist.*, No. 18-cv-01091 (W.D. Tex. Dec. 16, 2018), https://www. documentcloud.org/documents/5631742-Bahia-Amawi-s-Lawsuit-Against-Texas-Over-Israel.html; see also Glenn Greenwald, "A Texas Elementary School Speech Pathologist Refused to Sign a Pro-Israel Oath, Now Mandatory in Many States — so She Lost Her Job," *The Intercept*, Dec. 17, 2018, https://theintercept.com/2018/12/17/israel-texas-anti-bds-law/.

166 "School Speech Pathologist in Texas Terminated For Refusing to Sign Israel Oath," video interview with Bahia Amawi, *The Intercept*, December 17, 2018, https://youtu.be/f_j5pNTGnkM.

167 Kyle Swenson, "This Texas town offers hurricane relief — if your politics are right," *Washington Post*, Oct. 20, 2017, https://www. washingtonpost.com/news/morning-mix/wp/2017/10/20/texas-town-makes-hurricane-harvey-aid-applicants-pledge-not-to-boycott-israel/. Following an outcry, city officials clarified that individual homeowners were exempt from the requirement. https://www. nbcnews.com/news/us-news/harvey-relief-program-nixes-requirement-not-boycott-israel-n814796; https://www.npr.org/sections/thetwo-way/2017/10/20/559070267/need-hurricane-aid-in-one-texas-city-if-you-boycott-israel-you-may-be-out-of-luc.

168 Nick Estes, Our History Is the Future (New York: Verso, 2019), 2-3.

169 While a host of critical-infrastructure-related bills targeting protest have existed at least since Louisiana passed Act 157 in 2004, the most recent wave of progressively more punitive state laws began appearing on the heels of the #NoDAPL protests. See generally: Connor Gibson, "State Bills to Criminalize Peaceful Protest of Oil and Gas 'Critical Infrastructure," *Polluter Watch*, February 18, 2019, https://polluterwatch.org/State-Bills-Criminalize-Peaceful-Protest-Oil-Gas-Critical-Infrastructure-pipelines.

170 Oklahoma House of Representatives, https://sg001-harmony.sliq.net/00283/Harmony/en/PowerBrowser/PowerBrowserV2/20170222/-1/7904?mediaStartTime=20170222102919&mediaEndTime=20170222110755&viewMode=3, Timestamp: 10.45.36 a.m., "Yes, [the Dakota Access Pipeline protests] is the main reason behind this"; see full exchange between 10.40.15 a.m.-10.45.40 a.m.

171 Ibid.

172 American Legislative Exchange Council, "Critical Infrastructure Protection Act," https://www.alec.org/model-policy/critical-infrastructure-protection-act/.

173 International Center for Not-For-Profit Law, "US Protest Law Tracker," http://www.icnl.org/usprotestlawtracker/?location=&status=enacted,enacted_with_improvements&issue=6&date=&type=.

174 Ibid. For analysis: http://webserver1.lsb.state.ok.us/cf_pdf/2017-18%20ENR/hB/HB2128%20ENR.PDF.

175 American Legislative Exchange Council, "Critical Infrastructure Protection Act," https://www.alec.org/model-policy/critical-infrastructure-protection-act/.

176 "An industry letter ALEC sent to state lawmakers," uploaded to Scribd by Alexander Kaufman, 2, https://www.scribd.com/document/371677094/ALEC-letter.

177 Grant Kidwell, American Legislative Exchange Council, "Protecting Everyday Life Means Protecting America's Infrastructure," January 24, 2018, https://www.alec.org/article/protecting-everyday-life-means-protecting-americas-infrastructure/.

178 Ethics Disclosure filed by State Rep. Joseph H. Major Thibeault, Jr., Report No. 22148, filed February 1, 2011, 49. http://ethics.la.gov/CampaignFinanceSearch/LA-22148.pdf.

179 Alleen Brown and Will Parrish, "Louisiana and Minnesota introduce anti-protest bills amid fights over Bayou Bridge and Enbridge pipelines," *The Intercept*, February 21, 2018, https://theintercept.com/2018/03/31/louisianaminnesota-anti-protest-bills-bayou-bridge-enbridge-pipelines.

180 Nick Surgey, Coal and Oil Polluters Dominate ALEC Conference, *PRWatch*, July 31, 2014, https://www.prwatch.org/ news/2014/07/12557/polluters.

181 L'eau Est La Vie Facebook page, https://www.facebook.com/LeauEstLaVie/.

182 Mary Conroy, "Phillips 66 (PSX) Versus ConocoPhillips (COP)," Investopedia, July 24, 2016,

https://www.investopedia.com/articles/insights/072416/phillips-66-vs-conocophillips-how-they-differ-cop-psx.asp.

183 Ethics Disclosure filed by state Rep. Joseph H. Major Thibeault, Jr., Report No. 34733, filed February 7, 2013, http://www.ethics.la.gov/CampaignFinanceSearch/ShowEForm.aspx?ReportID=34733; Ethics Disclosure filed by state Rep. Joseph H. Major Thibeault, Jr., Report No. 50248, filed September 21, 2015 http://www.ethics.la.gov/CampaignFinanceSearch/ShowEForm.aspx?ReportID=50248; Ethics Disclosure filed by state Rep. Joseph H. Major Thibeault, Jr., Report No. 68262, filed February 6, 2018 http://www. ethics.la.gov/CampaignFinanceSearch/ShowEForm.aspx?ReportID=68262.

"Oil and Gas Contributions to Legislators Sponsoring Oil & Gas 'Critical Infrastructure' Anti-Protest Bills, 2015-2018," Google Doc, https://docs.google.com/spreadsheets/d/1NzOH8yTjyqwtlB_TYwxuq77vFEInAndwuZINr7a51pO/edit#gid=1498139062. See generally, Connor Gibson, "State Bills to Criminalize Peaceful Protest of Oil and Gas 'Critical Infrastructure," *Polluter Watch*, February 18, 2019, https://polluterwatch.org/State-Bills-Criminalize-Peaceful-Protest-Oil-Gas-Critical-Infrastructure-pipelines and FollowTheMoney.org, https://www.followthemoney.org/.

185 International Center for Not-For-Profit Law, "US Protest Law Tracker," http://www.icnl.org/usprotestlawtracker/?location=&status=enacted,enacted_with_improvements&issue=6&date=&type=.

186 Center for Media and Democracy, "North Dakota ALEC Politicians," SourceWatch, https://www.sourcewatch.org/index.php/North_

Dakota_ALEC_Politicians.

187 Center for Media and Democracy, "South Dakota ALEC Politicians," *SourceWatch*, https://www.sourcewatch.org/index.php/South_Dakota_ALEC_Politicians.

188 Center for Media and Democracy, "Tennessee ALEC Politicians," *SourceWatch*, https://www.sourcewatch.org/index.php/Tennessee_ALEC_Politicians.

189 Connor Gibson, "Texas – Oil and Gas 'Critical Infrastructure' Anti-Protest Bills," *Polluter Watch*, March 25, 2019, https://polluter-watch.org/TEXAS-Oil-Gas-Critical-Infrastructure-Anti-Protest-Bills-alec-csg.

190 Center for Constitutional Rights, *White Hat v. Landry* case page, https://ccrjustice.org/home/what-we-do/our-cases/white-hat-v-landry.

191 Center for Constitutional Rights, "New Lawsuit Challenges Anti-Protest Trespass Law," press release, May 22, 2019, https://ccrjustice.org/home/press-center/press-releases/new-lawsuit-challenges-anti-protest-trespass-law.

192 Common Cause, "Before Annual ALEC Conference, New Report Exposes Secretive Group's Political Influence in Louisiana," press release, August 6, 2018,

https://www.commoncause.org/press-release/before-annual-alec-conference-new-report-exposes-secretive-groups-political-influence-in-louisiana/.

193 Complaint at ¶¶ 50, *White Hat v. Landry*, no. pending (M.D. LA, May 22, 2019), https://ccrjustice.org/sites/default/files/at-tach/2019/05/White%20Hat%20v%20Landry%20Complaint.pdf.

194 Christine Baniewicz, "Under Louisiana Bill, Peaceful Protesters Could Face 20 Years in Prison," *Truthout*, April 18, 2018, https://truthout.org/articles/under-louisiana-bill-peaceful-protesters-could-face-20-years-in-prison/.

195 Complaint at ¶¶ 49, White Hat v. Landry.

196 *Ibid*, ¶¶ 55.

197 Complaint at ¶¶ 19, White Hat v. Landry.

198 Bayou Bridge v. Carline, Docket No. 87011, 16th Judicial District, Parish of St. Martin, Louisiana, https://ccrjustice.org/sites/default/ files/attach/2018/12/Reasons%20for%20Judgment--Bayou%20Bridge%20Pipeline%20vs%20Carline%20et%20al.pdf.

Photo Citations

Pages 26–27 "People protesting the Dakota Access Pipeline stand with signs and banners across from San Francisco City Hall" by Pax Ahimsa Gethen is licensed by CC BY-SA 4.0.

Page 29 Sign at #AbolishALEC protest, ALEC Annual Meeting, New Orleans, July 2018. Photo: Meg Logue.

Page 30 "Gov. Jeb Bush, center, hands a pen used to sign a Gun Bill to Marion Hammer of the National Rifle Association on Tuesday, April 20, 1999 in Tallahassee, Fla." by AP Photo/Eric Tournay

Page 32 "Trayvon Martin shooting protest 2012" by David Shankbon is Public Domain.

Page 33 King's Weekly. 11 Nov 1898. Public Domain.

Page 33 "Abolish rigged elections" by sharonkubo is licensed by CC BY 2.0.

Page 37 "Enclosures: Quotidian Carceralities in the US and Occupied Palestine (Angela Davis)" by Columbia GSAPP is licensed by CC BY 2.0.

Page 38 "Official Portrait of Senator Rick Scott (R-FL)" by United States Senate Photographic Studio is Public Domain.

Page 39 "Jay Sekulow Speaking at CPAC 2012, UNEDITED." by Mark Taylor is licensed by CC BY-2.0.

Page 39 Protesters in Ferguson Missouri take part in the 2014 Palestine contingent of "Ferguson October." Photo: Christopher Hazou

Page 42 "Dakota Access Pipeline protests at Standing Rock" by Fibanacci Blue is licensed by CC BY-2.0.

Page 44 "Bayou Bridge Pipeline Protest 16" by Julie Dermansky.

Page 45 #BlockALEC Protesters outside ALEC Annual Meeting in Austin, TX 2019 (L-R) Jennifer Falcon, Anne White Hat, Meg Logue. Photo: Dominic Renfrey



W hile ALEC has had success for many years pursuing its agenda, it is not without vulnerabilities. Advocates, activists, and movements seeking to push back against its corporate-first, racist agenda can take meaningful action to resist ALEC's influence over law and policy-making and reclaim the people's right to self-determination.

This section is designed to facilitate generative strategizing for advocates. Specifically, in the spirit of cross-movement solidarity, this section will draw on past successes by progressive grassroots movements for social justice across issue areas – often but not always battling ALEC-sponsored legislation – to suggest a way forward to reclaim our law and policy-making spaces from corporate control.

Political Advocacy Opportunities

With an increased presence of progressive politicians in federal and state legislatures, there are a growing number of opportunities to take on corporate control of legislative decision-making through political advocacy.

Calling on Elected Officials and Corporations to Cut Ties with ALEC

As demonstrated by the group Stand Up to ALEC,¹⁹⁹ a viable advocacy approach is to make

sure state lawmakers know that their constituents do not want them associating with ALEC. Key times to mobilize constituents to register their concerns about ALEC with their representatives are during political primaries, in the lead-up to state elections, and in the recess period before state legislatures convene.

Although it is not always easy to know whether an elected state lawmaker is a member of ALEC (as explained above, ALEC does not identify its members are unless they are part of an ALEC Task Force), groups like Stand Up to ALEC,²⁰⁰ the Center for Media and Democracy,²⁰¹ and Documented²⁰² have all compiled information that can be used to identify whether a state lawmaker has affiliations with ALEC, and how deep those affiliations run.

Similarly, as illustrated by the successful advocacy of Color of Change and other public interest groups, advocates can have a significant impact on ALEC's activities by undertaking sustained public pressure campaigns on corporate members to withdraw their membership.²⁰³

Fighting Laws in Committee

Each state legislature has its own legislative process. However, across legislatures, before bills are finalized for a vote, they may be referred to issue-specific committees. The legislators forming each committee scrutinize a bill's contents before voting to approve or deny advancement of the bill. Importantly, at this stage of the legislative pro-



Protester at #AbolishALEC protest outside ALEC Annual Meeting in New Orleans, 2018.

cess, bills can be amended; if advocates are unable to stop an ALEC bill altogether, they can still focus efforts on altering its contents.

The Louisiana Critical infrastructure Law discussed in Section 2 of this report was originally much more expansive and punitive than the final bill as passed. It was weakened in committee in response to advocacy by organizers and activists from 350 New Orleans and other groups that intervened to urge the elimination of a number of its provisions.

When a law is not in the interest of a state's population and did not originate with the will of that population, the attorney general should not view it as a legitimate and enforceable statute

Originally, the bill contained language to allow for imprisonment for up to 12 years

and a fine of \$250,000 for merely conspiring to interfere with the operations or construction of a pipeline, and a minimum prison term for trespassing on a pipeline construction site.²⁰⁴ The advocates successfully pressed to have these provisions removed and other language added prohibiting use of the law to criminalize or prevent a) lawful and peaceful protest on matters of public interest; and b) recreational and commercial activities in the area, including crawfishing.²⁰⁵

A Role for Attorneys General

Civil society organizations often pressure state attorneys general to defend their state residents against discriminatory or harmful policies and laws. In recent months and years, civil society organizations have successfully rallied state attorneys general to exercise their robust legal authority to refute several policies put forth by the Trump administration that would have a harmful impact on their residents.

In the immigration context, for example, the National Immigration Law Center has issued guidance to attorneys general encouraging them to protect immigrants from the Trump administration's targeted attacks.²⁰⁶ In Colorado, the Colorado People's Alliance has urged Attorney General Cynthia Coffman to protect the rights of recipients of Deferred Action for Childhood Arrivals (DACA), despite threats from the federal government to repeal the program protecting undocumented students.²⁰⁷ Similarly, in the case of California's sanctuary laws, California's attorney general has vowed to protect the state's sanctuary laws and "defend them against the U.S. Justice Department's lawsuits."²⁰⁸ In both instances, state attorneys general have been pressured by, but also worked with, groups like the Service Employees International Union.

State attorneys general have also played critical roles in opposing the administration's rollback of labor protections,²⁰⁹ Trump's Muslim Ban,²¹⁰ and net neutrality repeal.²¹¹

When unable to prevent ALEC model legislation from becoming law, advocates can appeal to state attorneys general to not enforce ALEC-originated laws given their undemocratic origins. When a law is not in the interest of a state's population and did not originate with the will of that population, the attorney general should not view it as a legitimate and enforce-able statute.

State attorneys general may also examine whether ALEC, as a 501 (c) (3) non-profit organization, is operating in accordance with relevant state laws governing the activities of charitable organizations within their state. Again, advocates and cooperating movement lawyers can play an integral role in activating political opinion in favor of attorneys general taking such action.

Legislative instruments for transparency and accountability

Open Meetings Laws

Public access to agencies, boards, committees, and other government bodies is governed by a category of laws known as open meetings laws. These laws allow constituents to attend — and scrutinize — government meetings.²¹² Most open meeting statutes prohibit members of local government bodies not just from conducting official meetings in secret, but also from conducting informal, out-of-session "meetings" outside of the public eye as well.²¹³

According to these laws, such informal meetings are typically defined by their purpose, to perform public business, and are presumed to be open to the public.²¹⁴ Legislative and executive bodies are required to publish an advance notice of certain proceedings, such as formal rulemaking hearings, enforcement proceedings, and other administrative matters, so that the public can plan to attend.²¹⁵ In some instances, these laws also entitle the public to copies of minutes, transcripts, or recordings.²¹⁶

Open meetings laws do have several critical exemptions that shield government bodies from transparency requirements. Meetings are allowed to remain closed when dealing with certain sensitive subject matters, including "pending litigation, the purchase of real estate, and official misconduct."²¹⁷ Meetings are also allowed to remain closed to the public when dealing with private information about an individual, trade secrets, or other confidential information.

Open meetings laws can support the work of advocates when there is suspicion that ALEC is meeting with a quorum of lawmakers from a state public body out of the public view. While open meetings laws vary from state to state, generally any meeting of a quorum of members of a state public entity is subject to disclosure requirements. For more specific information on the rules and regulations governing each state, see the Reporters Committee for Freedom of the Press's "Open Government Guide."²¹⁸

Lobbying Registries

ALEC is classified as a 501(c)(3) public charity with the IRS and therefore is subject to strong restrictions on the amount of lobbying it is permitted to engage in. However, the organization appears to exist for the sole purpose of facilitating private corporate lobbying of state legislators.²¹⁹ To that end, in April 2012, Common Cause filed a complaint against ALEC charging it with misusing charity laws, massively underreporting lobbying activities, and obtaining improper tax breaks for corporate funders at the expense of taxpayers.²²⁰

Lobbying registration is regulated both federally and locally.²²¹ Lobbying registries vary greatly between states as each state defines a lobby or a lobbyist very differently.²²² In 2015, the Sunlight Foundation published a lobbying disclosure scoreboard ranking of all 50 states.²²³ For example, ALEC is registered in Virginia²²⁴ and is subject to relevant provisions of the Code of Virginia, however, the state's disclosure requirements on political activity are relatively lax.²²⁵

Public Records

All states have public records laws that allow members of the public to obtain public records from state and local government bodies. Broadly, there are many barriers to obtaining access to government records or to certain areas of government. ALEC has taken advantage of these barriers, such as records exemptions, to infiltrate local government bodies across the country without public scrutiny.

In 2013, the Center for Media and Democracy sued Wisconsin state Senator Leah Vukmir over her failure to disclose ALEC-related materials under Wisconsin's records law.²²⁶ Through the litigation, it was made clear that ALEC attempts to seal its documents by arguing that they are "internal ALEC documents," which "ALEC believed is not subject to disclosure under any state Freedom of Information or Public Records Act."²²⁷

ALEC has taken advantage of barriers, such as records exemptions, to infiltrate local government bodies across the country without public scrutiny.

Vukmir and Wisconsin Attorney General J.B. Van Hollen's Department of Justice took the unprecedented position of arguing that Vukmir is immune from suit during her two-year legislative term. After a year of litigation, Vukmir settled with the Center for Media and Democracy and released the documents at issue.²²⁸

Filing public records requests, backed up by public interest litigation, has been successful in revealing ALEC's inner workings, members, and schedules. In 2019, Documented obtained a list of members on the ALEC Commerce, Insurance and Economic Development Task Force through an Ohio public records request.²²⁹ Similarly, in anticipation of the Republican Attorneys General Association (RAGA)'s "Oil and Gas Summit" in Houston, Texas, Documented obtained a copy of a heavily redacted draft agenda through a public records request to the office of the North Dakota Attorney General.²³⁰

For more specific information on which state open records laws cover legislators, refer to the Reporters Committee for Freedom of the Press's "Open Government Guide."²³¹ In states where public records laws do cover legislators, advocates can use these laws to seek communications between ALEC and state lawmakers.

Disclosure of Legislators' Expenditures and Tax Documents

Financial disclosure laws provide constituents with the tools to track conflicts of interest between a candidate or officeholder and their respective personal financial interests, or those of their donors, and the politician's policy positions or actions in office.²³² These laws are meant to protect transparency and engender trust in politicians and in their policies.

In about two-thirds of states, financial disclosure forms for candidates and officeholders are available online. In the other third of states, records are accessible by filing an in-person request. In some states, officials processing record requests are mandated to verify the names and addresses of all those making a request, and mandate that requests be handwritten.²³³ Disclosure laws can help advocates seek information about expenditures lawmakers make in relation to ALEC meetings.

'Revolving Door' Bans

"Revolving door" bans forbid departing public officials from lobbying for a period of time after leaving public office. The laws are designed to prevent state officials acting in a way favorable to a lobbyist in return for private employment after leaving public service. The length of such bans varies depending on the state, and there are various nuances in some states' laws. There are also restrictions at the federal level.²³⁴

Revolving door bans provide some support to advocates in monitoring whether state lawmakers are operating ethically or are making decisions that favor ALEC members in return for future employment in the private sector. Review the different state laws on revolving door bans at the National Conference of State Legislatures website.²³⁵

'Conflict of Interest' Laws

Conflict of interest laws are designed to ensure lawmakers make decisions in the public interest rather than for their own personal financial gain. States have widely varying ethics requirements for lawmakers, but generally all have public entities mandated to investigate allegations of conflict of interest violations. These conflict of interest laws provide an avenue for investigating lawmakers when advocates suspect unethical conduct by an elected legislator. Review the related section of the National Conference of State Legislatures website for more information.²³⁶

Continuing the Fight at the International Level

UN Treaty on Transnational Corporations and Other Business Enterprises

Since the late 1990s, public health and corporate accountability advocates from more than 100 countries have pushed member states of the United Nations to establish a robust international framework to regulate the tobacco industry. This effort has largely been led by two civil society networks: the Framework Convention Alliance (FCA) and the Network for Accountability of Tobacco Transnationals (NATT).²³⁷ The NATT in particular, coordinated

by U.S.-based Corporate Accountability International with over 100 members in more than 50 countries, was pivotal in ensuring that countries adopted a provision in the UN Framework Convention on Tobacco Control (FCTC) limiting the role of the tobacco industry in formulating national health policies. Civil society groups successfully argued, on the strength of evidence exposed by litigation in the U.S. and elsewhere, that tobacco companies have a clear conflict of interest when formulating health and other policies, and have regularly sought to derail regulation of tobacco products.

NATT and FCA's success in limiting the tobacco industry's capture of health



Treaty Alliance members at UN negotiations, 2017.

policy formulation has inspired activists and organizers to campaign for a similar UN human rights treaty to regulate corporate abuses of human rights generally. The Treaty Alliance, a loose campaign endorsed by more than a thousand organizations in over 100 countries, has successfully encouraged states to include a "corporate capture" provision into the text of an international treaty. In its most recent draft, UN treaty draft Article 5.5 reads: "In setting and implementing their public policies...State Parties shall act to protect these policies from commercial and other vested interests of persons conducting business activities...."²³⁸

States drafting this treaty have drawn from the language of the FCTC, which reflects the call that some UN member states, the FCTC Secretariat, and civil society organizations have made in the annual negotiations that take place at the UN.²³⁹ In repeatedly calling over several years for this provision to be included in the future UN treaty, the Center for Constitutional Rights has several times made explicit mention of ALEC's legacy of corporate capture, and particularly pointed to the effects of its influence on people of color.²⁴⁰



Endnotes

199 Stand Up to ALEC, "Stop the Swamp," https://standuptoalec.org/stoptheswamp/.

200 Ibid.

201 Center for Media and Democracy, "ALEC Politicians," Source Watch, https://www.sourcewatch.org/index.php?title=ALEC_Politicians.

202 "ALEC 2019 Annual Meeting Attendee List," Documented, https://documented.net/alec-2019-annual-meeting-attendee-list/.

203 Color of Change, "Targeting and Weakening ALEC," https://colorofchange.org/campaigns/victories/targeting-and-weakening-alec/.

Alleen Brown and Will Parrish, "Louisiana and Minnesota Introduce Anti-Protest Bills Amid Fights Over Bayou Bridge and Enbridge Pipeline," *The Intercept*, March 31, 2018, https://theintercept.com/2018/03/31/louisiana-minnesota-anti-protest-bills-bayou-bridge-enbridge-pipelines/.

205 Original bill: https://www.legis.la.gov/legis/ViewDocument.aspx?d=1078897; bill as passed: https://www.legis.la.gov/legis/ViewDocument.aspx?d=1097619.

206 National Immigration Law Center, "Flexing Their Executive Muscle: How Governors and State Attorneys General Can Use Their Authority to Support and Protect Immigrants," Last updated December 3, 2018, https://www.nilc.org/exec-authority-to-support-protect-immigrants/.

207 Jeff Todd, "Immigration Activists Urge Support for DACA Program," CBS Denver, July 13, 2017, https://denver.cbslocal. com/2017/07/13/immigration-daca/.

208 Matt Zapatosky, "California Tells Local Law Enforcement to Follow Federal Law – But Not Be Immigration Enforcers," March 28, 2018, https://www.washingtonpost.com/world/national-security/california-tells-local-law-enforcement-to-follow-federal-law--but-dont-be-immigration-enforcers/2018/03/28/bee713f4-32b2-11e8-94fa-32d48460b955_story.html?utm_term=.2cb1ee754f78.

209 Attorney General Xavier Becerra, "Proposed Rescission of Tip Regulations Under the Fair Labor Standards Act," letter to Secretary of U.S. Department of Labor Alex Acosta, February 5, 2018, https://oag.ca.gov/system/files/attachments/press_releases/Comment%20 of%20State%20Attorneys%20General%20re%20Proposed%20Rescission%20of%20Tip%20Regulations%20%28003%29.pdf.

210 Keith Ellison, "How I will continue to defend the rights of all Minnesotans as your Attorney General," *Insight News*, August 9, 2018, https://www.insightnews.com/opinion/keith-ellison-how-i-will-continue-to-defend-the-rights/article_f286c10a-9bf8-11e8-87c4-af-cac320541e.html.

211 Jim Puzzanghera, "Suit by 22 state attorneys general seeks to block FCC's net neutrality repeal," Los Angeles Times, January 16, 2018, "https://www.latimes.com/business/la-fi-net-neutrality-lawsuit-20180116-story.html.

212 Digital Media Law Project, "Access to Government Meetings," October 9, 2019, http://www.dmlp.org/legal-guide/access-government-meetings.

213 John F. O'Connor and Michael J. Baratz, "Some Assembly Required: The Application of State Open Meetings Laws to Email Correspondence," Steptoe, 2004, https://www.steptoe.com/images/content/9/1/v1/917/1481.pdf.

Alex Aichinger, "Open Meeting Laws and Freedom of Speech," *The First Amendment Encyclopedia*, 2009, https://mtsu.edu/first-amendment/article/1214/open-meeting-laws-and-freedom-of-speech: "To clarify the meaning of 'meeting' and to address today's virtual or electronic communications capabilities, several states have relied on the analysis provided by the Washington state appeals court decision in *Wood v. Battle Ground School District* (2001)."

215 Justia, "Open Record/Meeting Laws," https://www.justia.com/administrative-law/open-record-meeting-laws/.

216 Digital Media Law Project, "Access to Government Meetings," October 9, 2019, http://www.dmlp.org/legal-guide/access-government-meetings.

217 Ibid.

218 Reporters Committee for Freedom of the Press, "Open Government Guide," https://www.rcfp.org/open-government-guide/.

219 Mary Graffam, "ALEC Exposed Shines a New Light on Shadowy Organization," *American Association for Justice*, July 19, 2011, https://www.justice.org/blog/alec-exposed-shines-new-light-shadowy-organization.

220 Common Cause, ALEC Whistleblower Complaint, webpage, October 1, 2016, https://www.commoncause.org/resource/alec-whistleblower-complaint/.

221 Office of the Clerk, U.S. House of Representatives, "Lobbying Disclosure Act Guidance," Section 4 – Lobbying Registration, https://lobbyingdisclosure.house.gov/amended_lda_guide.html#section4:

federally, "lobbyists are required to register if they spend 20 percent of their time lobbying and make two lobbying contacts. In addition, organizations that employ in-house lobbyists are required to register if their total expenses for lobbying activities in a quarter exceed \$11,500."

222 National Conference of State Legislators, "How States Define Lobbying and Lobbyists," September 30, 2019, http://www.ncsl.org/ research/ethics/50-state-chart-lobby-definitions.aspx.

223 "Disclosure Legislation/ Practices : [State Lobbying] Final Grades," Google Document, https://docs.google.com/spreadsheets/d/1W-GGCw4eMDEdPvGGRD07Cef_11iVRnM-XBXWRGluHsAE/pubhtml.

Virginia Department of Agriculture and Consumer Services, Offices of Charitable and Regulatory Programs, "American Legislative Exchange Council," Charitable Organization Database, http://cos.va-vdacs.com/cgi-bin/char_search.cgi?act=2&sysorgno=14569&orgname=American%20Legislative%20Exchange%20Council.

For example, a "charitable purpose" in Virginia's code is defined, in part, as "influencing legislation or influencing the actions of any public official" (§ 57-48), and the lobbying reporting requirements are minimal (§ 2.2-422). See: Virginia's Legislative Information System, Code of Virginia, Chapter 5. Solicitation of Contributions, § 57-48. Definitions, https://law.lis.virginia.gov/vacodefull/title57/chapter5/.

226 Center for Media and Democracy v. Leah Vukmir, State of Wisconsin Circuit Court, Dane County, Code. No. 30952, https://www.prwatch.org/files/CMD_Vukmir_Complaint_June6.pdf.

227 Patrick Marley, "Negotiations may end open records lawsuit against Leah Vukmir," *Milwaukee-Wisconsin Journal Sentinel*, December 4, 2013, http://archive.jsonline.com/news/statepolitics/negotiations-may-end-open-records-lawsuit-against-leah-vukmir-b99155979z1-234398861.html.

228 Ibid.

229 Jamie Corey, "New ALEC Membership List Names More Legislators Tied to the Group," *Documented*, June 6, 2019, https://documented.net/2019/06/06/new-alec-membership-list-names-more-legislators-tied-to-the-group/.

230 Jamie Corey, "Republican Attorneys General Group Hosting 'Oil and Gas Summit," *Documented*, April 8, 2019, https://documented. net/2019/04/08/republican-attorneys-general-group-hosting-oil-and-gas-summit/.

231 Reporters Committee for Freedom of the Press, https://www.rcfp.org/open-government-sections/2-legislative-bodies/.

Elaine S. Povich, "State Financial Disclosure Antiquated, Inaccessible," The PEW Charitable Trusts, October 27, 2016, https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/10/27/state-financial-disclosure-antiquated-inaccessible.

233 Ibid.

Ederally, "executive order ethics pledges are one of several tools, along with laws and administrative guidance, available to influence the interactions and relationships between the public and the executive branch." In 2008, President Barack Obama vowed to keep out lobbyists and shut the revolving door between government agencies and lobbying organizations. On his first full day as president, Obama signed an executive order to bar executive appointees from working for lobbyists that lobbied that appointee's department for two years after leaving the government. The ban also prohibited lobbyists from working for the government department they lobbied for two years after leaving their employer. After his election, President Trump vowed to strengthen Obama's Revolving Door Ban executive order by issuing Executive Order (E.O.) 13770 with a five-year lobbying ban. However, the Trump administration has issued so many exemptions that the operation of the law is effectively weaker. See: https://www.politico.com/story/2017/01/trump-lobbying-ban-weakens-obama-ethicsrules-234318.

235 Revolving Door Prohibitions webpage, National Conference of State Legislatures, August 13, 2019, http://www.ncsl.org/research/ethics/50-state-table-revolving-door-prohibitions.aspx.

236 Conflict of Interest Definitions webpage, National Conference of State Legislatures, http://www.ncsl.org/research/eth-ics/50-state-table-conflict-of-interest-definitions.aspx.

237 Kelle Louaillier, "How the Network for Accountability of Tobacco Transnationals fostered the Global Tobacco Treaty," American Public Health Association 138th Annual Meeting and Exposition, 2010,

https://www.researchgate.net/publication/266793640_How_the_Network_for_Accountability_of_Tobacco_Transnationals_fostered_the_ Global_Tobacco_Treaty; Anna White, "Controlling Big Tobacco: the Winning Campaign for a Global Tobacco Control Treaty," *Multinational Monitor*, Jan/Feb 2004, https://www.multinationalmonitor.org/mm2004/012004/white.html#name.

²³⁸ "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises," United Nations Office of the High Commissioner for Human Rights, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf.

239 Texts of interventions states and others have made to the five years of negotiations are accessible at the homepage of the UN Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights at: https:// www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx. 240 Oral Statement of the Center for Constitutional Rights and Adalah Justice Project, fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, United Nations Office of the High Commissioner on Human Rights, 2018, https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4. aspx.

Photo Citations

- Pages 52–53 Coalition against Death Alley protesting at Louisiana State Capitol, 2019. Photo: Dominic Renfrey
- Page 54 Protester at #AbolishALEC protest outside ALEC Annual Meeting in New Orleans, 2018. Photo: Tara T
- Page 58 Treaty Alliance members at UN negotiations, 2017. Photo: Victor Barro





To ALEC

- Disband all ALEC Task Force groups and do not accept lawmakers as members.
 - Make publicly available online the full archives of all proposed and passed ALEC model legislation, including sponsors.
- Make publicly available online a comprehensive list of current and past legislative and corporate members.

To State Governmental Authorities

State Lawmakers:



- Do not associate with ALEC.
- Disclose current and past affiliations with ALEC. Release public information detailing attendance at ALEC convenings, participation in ALEC Task Forces, and communications with or facilitated by ALEC officials.
- Amend state open meetings laws to ensure they cover lawmakers' activities at ALEC meetings.
- Amend state open records laws permitting public access to information and materials relating to all interactions between ALEC and lawmakers.

Attorneys General

 Investigate whether ALEC's lobbying activities violate state laws governing the activities of charitable organizations.

District Attorneys and Prosecutors

Use prosecutorial discretion to refuse to criminally prosecute individuals under statutes drawn from ALEC model legislation.

To Federal Governmental Authorities

Internal Revenue Service

Investigate whether ALEC's lobbying activities violate federal laws governing the activities of charitable organizations.

To Progressive Lawmakers in the U.S. Congress



Hold hearings on the negative and widespread impact of ALEC's activities on people of color across the U.S., with firsthand testimony from racial justice, Indigenous, and Palestinian rights organizations.

Formally inquire into whether the Internal Revenue Service has begun investigating whether ALEC's lobbying activities violate federal laws governing the activities of charitable organizations.

To the Private Sector

Journalists and Media Organizations

- Closely investigate the connections that conservative and pro-corporate state laws have to ALEC's members, Task Force activities, annual meetings, and model legislation.
- Track bills across state legislatures that have originated from ALEC model legislation.
- Cover ALEC convenings, and publish as much information as possible.
- Utilize public records requests to obtain any internal ALEC documents, communications, and information that are in the public interest to publish.

Funder Organizations and Other Financial Supporters of Progressive Activism and Organizing

Prioritize funding for organizations fighting corporate capture, with special consideration given to Black, Indigenous, female, gueer, and/or immigrant-led organizations that adopt an intersectional critique of corporate capture.

To Public Interest Organizations

Organizers and Movement Groups

- Continue cross-movement organizing to focus attention on ALEC.
- Continue pressing state lawmakers to not associate with ALEC.

Progressive Social Justice Organizations

Focus research, advocacy, and legal activities on the impact ALEC has on people of color, beyond just the impacts ALEC's activities have on democracy and good governance.

Photo Citations

ALECATTACKS

CENTER FOR Constitutional Hights













Creative Legal Strategies

November 21, 2014



"Law and justice are distant cousins." - Andre Brink

The law is by its nature a conservative enterprise. Court decisions are typically based on a case's congruence with judicial precedent, statutory law or constitutional provisions, and often reinforce preexisting power and privilege. Social justice work, by contrast, is often about challenging power propagated through unjust laws or appealing to higher, aspirational norms. Being dedicated, as CCR's mission statement says, to "the creative use of law as a positive force for social change" means mining the fine veins of constitutional principles that are justice-enabling, uncovering underutilized rules and rulings, surfacing stories of real individuals and communities impacted by injustice, using litigation strategically to move actors outside the courtroom, understanding the interplay between U.S. law and international law, and fostering solidarity with impacted communities, including those across borders. At CCR we do all these things, <u>and more</u>, in our relentless pursuit of justice. Along the way, we have developed a distinctive set of tools and strategies. These include the following.

Alien Tort Statute (ATS)

The Alien Tort Statute (ATS), sometimes referred to as the Alien Tort Claims Act, is a federal statute passed by the first Congress in 1789, which allows foreign victims of serious international human rights violations to sue the perpetrators in U.S. courts. The law, originally designed to deal with then-grave international law violations such as piracy in international waters, was little-known and even less employed until CCR pioneered its use in a landmark 1979 case to hold a Paraguayan official accountable inside the U.S. for the torture and murder of the 17-year-old son of a Paraguayan dissident. Filártiga v. Peña-Irala

ushered in a new era in human rights law, spawning a legal movement for transnational justice and accountability.

CCR continued to use the ATS on behalf of victims of torture and other human rights abuses by government officials where there was no possibility of justice in their own country throughout the 1980s, but then began to expand the possibilities of its reach. In 1993, we brought and ultimately won a case against Radovan Karadžic, a non-state actor, for genocide, war crimes and crimes against humanity committed in Bosnia-Herzegovina. We also expanded the ATS use to hold <u>corporate actors</u> accountable through ATS litigation, including <u>Royal Dutch Petroleum</u> for human rights abuses against the Ogoni people in Nigeria, <u>Caterpillar</u> for war crimes in the Occupied Palestinian Territory, and <u>CACI</u> International for its role in the torture of prisoners at Abu Ghraib during the second Iraq War.

In 2013, the Supreme Court <u>partially limited</u> the reach of the ATS, but CCR and others in the ATS bar continue to bring cases using this unique legal tool.

International Law

CCR's use of the ATS as a tool to pursue human rights violations beyond our borders is emblematic of our global perspective and our expertise in international law. In recent decades, as the U.S. Supreme Court has constrained the protections of U.S. constitutional and civil rights law, CCR has sought to interject more expansive international human rights norms into the domestic legal conversation. We frequently bring a unique human rights analysis to issues such as police violence and discrimination or solitary confinement. The Center regularly advocates on behalf of our clients and causes with an array of U.N. bodies, from the Committee Against Torture and the Committee on the Elimination of Racial Discrimination to the Committee on the Rights of the Child and the Human Rights. Our international advocacy focuses most often on human rights law, but also on humanitarian law and the law of armed conflict, and international criminal law. In 2011, we filed a groundbreaking case against the <u>Vatican</u> with the International Criminal Court seeking accountability for the widespread and systemic sexual abuse of children and vulnerable adults by Catholic clergy and the high-level cover-up and enabling of the abuse.

Universal jurisdiction

The principle of <u>universal jurisdiction</u> allows the national authorities of any state to investigate and prosecute people for serious international crimes even if they were committed in another country. It is based on the notion that some crimes – such as genocide, war crimes, and torture – are of such exceptional gravity – so universal – that they affect the fundamental interests of the international community as a whole. Uniquely among U.S. rights organizations concerned about our government's post-9/11 torture program, CCR has actively pursued a half dozen cases in multiple countries seeking to investigate and prosecute those Bush Administration officials who authorized, designed and implemented the U.S. torture program in absence of the political will to do so at home.

Freedom of Information Act

"Democracies die behind closed doors," explained Judge Damon Keith in an important post-9/11 open government case. Yet the U.S. government has gone to unprecedented lengths to classify and bury

information about official conduct – and wrongdoing. For this reason, CCR has escalated its use of the Freedom of Information Act (FOIA) to shed light on the actions of both government and private actors. It has been an essential tool in defending activists facing government repression; in determining whether there is wrongdoing that warrants a lawsuit; and especially in the post-9/11 era, in uncovering gross human rights violations such as the "ghost detention" of men at CIA black sites. But CCR's unique use of FOIA requests and FOIA litigation has been as a tool to directly support, publicize, and advance justice struggles in strategic partnership with movement organizations. In our landmark case seeking information about the federal <u>Secure Communities</u> program, for instance, the goal was to uncover information that the <u>National Day Laborers Organizing Network</u> could use in its successful campaign to stop the expansion and lobby for the termination of the controversial deportation and fingerprinting program. Our FOIA work is a prime example of CCR's foundational commitment to crafting litigation in coordination with grassroots allies with the explicit aim of furthering the human rights and social justice struggles to which we are so passionately dedicated.

Last modified July 14, 2015

How We Work Who We Are Get Involved Press Center Internships and Fellowships Blog Donate

666 Broadway 7th Floor New York, NY 10012

Main: 212-614-6464 Donations: 212-614-6448 Fax: 212-614-6499

Privacy Policy



How We Define Victory

December 2, 2014



"First they ignore you, then they laugh at you, then they fight you, then you win." - Mahatma Gandhi

While CCR's unique contribution to human rights and social justice struggles is through its litigation work, we do not evaluate that work in traditional "lawyerly" ways. In decisions about what cases to take, in the choices we make about media and advocacy during the course of a case, and in our assessment of the success of the case, the Center looks beyond a narrow legal lens and considers above all a case's value to the social movements of which it is a part.

The Center accepts cases based on principle and the value of the struggle itself, not solely by using a calculus of how likely we are to win. We were the first organization to defend detainees at <u>Guantanamo</u>, for instance, because no matter how wildly unpopular it was at the time or how hostile the government was to the idea that those detainees had rights, the fight against indefinite detention is simply too important to bow to political expediency. Many of our cases are explicitly situated in larger justice struggles, and we take them with the intention of aiding those struggles.

To CCR, the value of a case is not determined solely by its outcome but in part by the attention it can draw to the rights at stake and the vulnerable communities on whose behalf we are fighting. This is one reason we have a robust communications program, so that we can effectively publicize our clients and our causes. Similarly, CCR's dedication to advocacy work reflects the commitment to strengthening the organic connection of our cases to the movements from which they arise and to using our cases to help make progress on issues before there even is a court ruling.

While CCR wins many groundbreaking cases – from Supreme Courts victories like <u>Rasul v. Bush</u> to sweeping reform mandates like <u>Floyd v. City of New York</u> – we also lose cases. But there is often "success without victory" in these cases, in the memorable words of CCR President and constitutional scholar Jules Lobel. Sometimes the scrutiny a case brings to an injustice forces partial reforms to happen in a response to public outcry, or in an effort to undermine our lawsuit. Other times, a case helps put an issue on the map and contributes to long-term struggle that results in victory years or decades later. Very often, CCR sticks with a case, a client, a cause over years and decades before we win – but eventually we do win.

May 27, 2015

Last modified

- How We Work
- Who We Are
- Get Involved
- Press Center
- Internships and Fellowships
- <u>Blog</u>
- Donate

666 Broadway 7th Floor New York, NY 10012

Main: 212-614-6464 Donations: 212-614-6448 Fax: 212-614-6499

Privacy Policy

JULES LOBEL

SUCCESS WITHOUT VICTORY

Lost Legal Battles and the Long Road to Justice in America

New York University Press • New York and London

7251607

NEW YORK UNIVERSITY PRESS

New York and London www.nyupress.org

© 2003 by New York University All rights reserved

Library of Congress Cataloging-in-Publication Data Lobel, Jules. Success without victory : lost legal battles and the long road to justice in America / Jules Lobel. p. cm. — (Critical America) Includes bibliographical references and index. ISBN 0-8147-5112-1 (cloth : alk.paper) 1. Law—United States—Anecdotes. 2. Justice and politics. 3. Political activists—United States—Anecdotes. I. Title. II. Series. K184.L63 2003 349.73—dc21 2003012365

New York University Press books are printed on acid-free paper, and their binding materials are chosen for strength and durability.

Manufactured in the United States of America

10 9 8 7 6 5 4 3 2 1

To my parents,

Paul and Lena Lobel, with gratitude and love

Introduction

Losers, Fools, and Prophets

ON A BRIGHT, sunny November morning in 1990, my fellow lawyer Michael Ratner and I stood on the steps of the Federal District Courthouse in Washington, D.C., listening to members of Congress explain why they were suing the president of the United States to prevent him from going to war against Iraq. More than a hundred national television newscasters, radio commentators, newspaper reporters, and free-lance journalists thronged the patio below us, but they appeared little interested in the constitutional issues that Michael and I were poised to explain. Instead, their eager, zealous questions to us and the legislators we represented focused on one issue: Could we win?

The journalists' concern reflected a deeply rooted American value on *winning*—the belief that, as Vince Lombardi once put it, "Winning isn't everything. It's the only thing."¹ And any realistic, rational, hardheaded American could easily see that Michael and I had only a slightly better chance of winning in Court than of having God suddenly appear in Washington to halt the impending war. What did we think we were doing?

Since that fall day, I have been intrigued by—even plagued by and obsessed with—the question of what "success" means. American culture constantly identifies success with winning and draws a sharp line between victory and defeat. In politics, business, and sports, we have a passion to win and a terror of losing. Professional sports leagues eliminate tie games, preferring clear winners and losers. The American entrepreneurs who brought European soccer to this country changed its rules to avoid dreaded ties. Our political elections are based on a winner-take-all model, unlike those in many European nations that prefer proportionate representation. Our law eschews mediation, where both parties give a little and receive something in return, preferring a courtroom drama designed to produce clear winners and losers.

In contrast, I seem to thrive on losing. With equally "unsuccessful" colleagues in places like the Center for Constitutional Rights, a nonprofit law firm that works on issues of international human rights, civil rights, and social justice, I've litigated an impressive number of lost cases. My brilliant losing streak on behalf of what I consider to be important political causes has caused me to ponder the winning metaphor in American life and, more specifically, in American law. Why do we remember Clarence Darrow, F. Lee Bailey, and the mythical, always victorious Perry Mason, yet forget great losers like Albion Tourgée, who unsuccessfully litigated *Plessy v. Ferguson*? Is there such a clear line between winning and losing, success and failure, or is reality more complex? Are success and failure really mutually exclusive, as we're taught, or do they exist in dialectical relationship to each other?

Most of my thinking about these issues grows out of a quixotic, decade-long effort, undertaken by the Center for Constitutional Rights (CCR) in conjunction with the National Lawyers Guild (NLG) and other legal groups, to litigate against U.S. military and economic intervention abroad in the 1980s. The Center, founded in 1966 by several civil rights lawyers, views as its mission the development of creative legal strategies to serve progressive political movements. Similarly, the National Lawyers Guild, founded in 1937 as the nation's first racially integrated bar association, is dedicated to the need for basic change in the structure of our political and economic system. During the Reagan and Bush presidencies, the lawyers at CCR, working with NLG and other lawyers, applied the creative approaches they had learned from the domestic civil rights struggles to challenge U.S. foreign policy in the courts.

This band of progressive lawyers brought almost a dozen cases challenging the U.S. government for sending military advisors and aid to El Salvador; launching a covert contra war against Nicaragua; prohibiting travel to Cuba; invading Grenada; and planning to attack Iraq without congressional authorization. We litigated on constitutional grounds, on international-treaty grounds, with innovative humanrights uses of old tort laws, and in almost every way we could dream up. We brought in co-plaintiffs from Congress, co-counsel from leading legal organizations, and students from prestigious law schools, all of us working around the clock. We joined with community groups and activists, carried out media and educational campaigns, and organized politically around our cases. Our foreign-policy litigation became a sort of Sisyphean quest as we maneuvered through a hazy maze cluttered with gates. Each gate we unlocked led to yet another that blocked our path, with the elusive goal of judicial relief always shrouded in the twilight mist of the never-ending maze.

Over the years, we were spectacularly unsuccessful in court. With a few exceptions, we lost every case we litigated.

By 1991, I was an experienced, accomplished, and well-polished loser. I turned forty, had a child with a serious disability, and avoided to some degree the quest to reflect on what, if anything, we had accomplished during those intense, exciting years of the 1980s. I wanted to understand not simply why we lost but what the value of our losing might be and what our legal battles might teach us about the bigger values of "success" and "failure" in our culture.

The mainstream legal milieu in which I taught and practiced law offered relatively easy answers. Losing cases have no effect on the law, which is seen as a collection of rules and precedents. While lawyers might have some respect for well-crafted losing arguments, most of them can't be bothered with lost causes.

Even within the law-reform community, many, such as the former NAACP Legal Defense Fund general counsel Jack Greenberg, argue that the main result of losing cases is the creation of bad legal precedent and that, therefore, test cases generally "should not be brought if they are likely to be lost."² My friend and fellow progressive lawyer Michael Krinsky once questioned whether our losing foreign policy cases "had the effect of validating the government position."

This prevailing view of the law is utilitarian, as is the dominant American view of success. To succeed means to win concrete results, to change the legal rules, to win damages for your client, or to obtain a court injunction. The utilitarian perspective is premised on a sharp divide between winning and losing, which in turn relies on a separation of law and politics. The success of a lawsuit under traditional doctrine depends on its legal result, not on any subtle and nuanced political effects it might create. The traditional lawyer seeks to win some judgment for her client, the law-reform litigator to achieve some structural change through a successful court challenge. While traditional public interest litigation may use concurrent political action to create a favorable climate for court victory and to implement that victory, it considers politics only a predicate to the courtroom drama.

In our losing efforts, however, we took a different view. First of all, the primary point of many of the cases we litigated was to inspire

4 INTRODUCTION: LOSERS, FOOLS, AND PROPHETS

political action. While we believed that the law was on our side and hoped the courts would agree, we used law not merely to adjudicate a dispute between parties but also to educate the public. Even though the political contexts of our challenges made courtroom success highly improbable, we persevered because our purposes were broader than victory alone. We were speaking to the public, not just to the court.

But, while we tended to use political action, not courtroom victory, as a marker for success, I have always been unsatisfied with justifying these cases as political agitation or defending our choice to persevere on purely political grounds. Some law-reform litigators ask whether the time and energy we spent on these cases could have been better expended on more productive political activities. As one lawyer friend recently claimed, "You wasted a lot of time, energy, and legal talent," litigating these hopeless cases. Other scholars, including many associated with the Critical Legal Studies Movement, question whether reliance on courts and litigation unduly narrows and restricts the political movements we sought to aid and even legitimated the very system we were challenging. So, while I believe our cases did help inspire public debate, dialogue, and political action in positive, albeit limited ways, I still had to question whether political "success" was any more valid as a criterion than legal success.

As I pondered these issues, I began instead to reevaluate the philosophical utilitarianism itself that underlies the mainstream view of success in law and life and to look at different traditions that critique it.

One view, perhaps expressed best in our country by Ralph Waldo Emerson and Henry David Thoreau, replaces "success" with expressive individualism, a kind of self-reliance that doesn't depend on the rewards of the outside world. In this view, work is a calling, an expression of oneself, and a way to cultivate moral sensibilities, not merely a utilitarian activity that leads to winning. "[We should] measure a person not primarily by the virtue of his actions," writes Thoreau, "but by the free character he is and is felt to be under all circumstances."³ Their focus on the inner, expressive self led Emerson and Thoreau to view success and failure not as dichotomies but as existing in dialectic tension and unity. "My entire success, such as it is," writes Emerson, "is composed wholly of particular failures."⁴

The Emersonian self-expressive mode has informed a tradition of American protest. In recent times, the example of Derrick Bell comes to mind: the distinguished legal scholar sacrificed his teaching job at Harvard Law School in protest over its refusal to hire a black woman professor. As Bell wrote, "At its essence, the willingness to protest represents less a response to a perceived affront than the acting out of a state of mind.... Often, the desire to change the offending situation which is beyond our reach may be an incidental benefit and not the real motivation. Rather, those of us who speak out are moved by a deep sense of the fragility of our self-worth. It is the determination to protect our sense of who we are that leads us to risk criticism, alienation, and serious loss while most others, similarly harmed, remain silent."⁵ In a similar vein, when former Supreme Court Justice William Brennan was questioned about the utility of his repeated dissents opposing capital punishment, he proffered not a utilitarian defense but an explanation that these dissents were expressions of his own conscience; his main purpose in writing them was to define himself and not to change society.⁶

For many of us who struggled in losing cases for decades, convinced of the morality and justice of our cause, it never really occurred to us to do anything different; our lives' meaning was precisely in carrying out this calling, whether it led to success or failure. We spent thousands of hours trying to succeed—we wanted to succeed—but our motivation was self-expressive and lay in the fight itself. My own moral and ethical outrage at the U.S. government's actions in Central America, for example, and my feelings for the victims of those actions compelled me to act. I had talked, made friends, and fallen in love with people whom I wanted to help. I was a lawyer, so I utilized my legal skills to express this desire. I did not undertake the calculations of a tort attorney as to the likely outcome of any case: it was the very act of challenging the injustice that I felt gave meaning to my life.

Yet, this self-expression rationale, a powerful antidote to the success culture of America, left me dissatisfied. For many years I had focused on working to better society, and I remained troubled by focusing on the self to justify what I did. The Emersonian critique, insightful as it was, still was an individualist one; although it extolled the expressive self rather than the ambitious, achieving self of the success-mongers, it was still an uncomfortable position for me to take. I wanted to look more deeply at community, not individualism, as a way to step outside the prison of winning and losing.

Digging deeper for answers, I began to look back to history, culture, tradition, and my own roots. I began with the uniquely American tradition of radical movements that sought to litigate their aspirations in

court. Throughout the nineteenth century, litigation as a means of protest was common—and most of those early litigators were losers.

Virtually hopeless test cases brought to challenge unjust policies is a recurring thread in the tapestry of American law. Radical abolitionists challenged aspects of slavery in American courts in the 1840s and 1850s, to no avail. Members of the post-Civil War women's movement advocated a broad interpretation of the Fourteenth Amendment and litigated women's rights in the 1870s in a series of cases that were uniformly unsuccessful. *Plessy v. Ferguson* was a test case brought in the 1890s by several civil rights lawyers who had strong doubts about their chances for success in that period of reaction.

One hundred years ago, Albion Tourgée, the lawyer who argued for Homer Plessy before the Supreme Court, agonized over issues of success and failure. In his best-selling autobiographical novel, titled *A Fool's Errand*, Tourgée argued that an individual is often both a fool and a genius, with only history's thin line separating the two. For Tourgée, there was no inherent difference between success and failure, prophecy or foolishness: historical circumstance was the determining factor.

In our era, I found others who continued the tradition of the nineteenth-century litigators like Albion Tourgée and struggled not simply for self-expression but in order to protest and to build movements. Most of them were losers, too. Labor activists have proposed innovative theories of employee property and contract rights to avert plant closings, although courts thus far have given these theories short shrift. Countless lawsuits challenged the constitutionality of the U.S. war in Indochina, with meager results. Lawyers for Haitian refugees sought to enjoin the Coast Guard's interdiction and return of Haitians, knowing that the Supreme Court was likely to uphold the government's policy.

This is the tradition of which I began to feel part. These cases have helped to create a community and a culture dedicated to litigating the constitutional aspirations of oppressed groups. Paradoxically, that culture survived and persisted in spite of, or maybe even because of, the failure in courts. Or, to put it differently, the current commitment of civil rights groups, women's groups, and gay and lesbian groups to a legal discourse and to legal activism to protect their rights stems in part from the willingness of activists in political and social movements in the nineteenth century to fight for rights, even when they realized the courts would be unsympathetic. I began to see how communities often gain their identities not in celebrating their victories over oppression but in remembering their defeats.

And I began to see how "failure" could not really be measured adequately by the winner-take-all model of American law. Certainly, on the face of it, the legal tradition I studied was unsuccessful. Many of the early nineteenth-century cases seem to have disappeared from our history, playing virtually no role even when the Court eventually reversed itself decades later. For example, Chief Justice Earl Warren's opinion in Brown v. Board of Education did not cite Albion Tourgée's argument in Plessy or even Justice John Marshall Harlan's ringing dissent in that case. The women's rights arguments before the Court in the 1870s were never cited or even referred to when those arguments were revived in abortion rights and women's rights litigation one hundred years later. If success can be measured only by direct result, immediate change, or easily perceived impact, then these earlier cases were unmitigated failures. But, if success can be viewed like the pentimenti of a painting, as an unseen underside necessary to the final perceptible painting, then these cases take on a different hue. Success inheres in the creation of a tradition, of a commitment to struggle, of a narrative of resistance that can inspire others similarly to resist.

The American success culture is invariably concerned with the present, with immediate accomplishments.⁷ In our view of success as individual achievement, we isolate the individual from community and from tradition. A society that so emphasizes success as immediate accomplishment lives almost exclusively in the present, with only tenuous ties to past generations or concerns for future generations.

An alternative model of success must place individual actions in the context of history and forge links of solidarity with communities and traditions. Most oppressed peoples have not cultures of success but, rather, cultures of remembrance where individuals view "success" not by present accomplishment but by their tie to past memories and future hopes and dreams. Such communities of memory, writes the sociologist Robert Bellah, tell "painful stories of shared suffering that sometimes create deeper identities than success."⁸

For example, African American culture in the United States has developed in large part out of the unifying shared memories of oppression and resistance. The historian Vincent Harding writes that the terrible vision of a black man being killed becomes a symbol and a source of

8 INTRODUCTION: LOSERS, FOOLS, AND PROPHETS

truths for the future. For Harding, "the river of struggle" is the connection between blacks living today and the history of the African American people, and it is within the context of that river that the failed slave revolts, the unsuccessful individual acts of resistance to slavery, and the losing legal resistance to slavery can all be understood.

My own Jewish culture and heritage provide another example of this tradition. The most powerful symbol of my childhood was standing for a moment of silence at the Passover Seder to remember the Warsaw ghetto uprising that commenced on Passover night in 1943. The narrative of the Jewish Warsaw ghetto uprising against the Nazis might be interpreted as a reminder that overwhelming force prevails against poorly armed resistance fighters or that the Jews were abandoned by the Poles and Allied nations. However, the message I took away from those Seders is that people can struggle even when faced with overwhelming odds and that, through struggle, they may achieve a spiritual victory over their oppressors.

I found links with that popular tradition in the action of lawyers like Helmuth James von Moltke, a German who was legal adviser to the High Command of the German Armed Services until he was executed by the Nazis in 1945. In battle after losing legal battle to protect the rights of Poles, to save Jews, and to oppose German troops' war crimes, he made it clear that he struggled not just to win in the moment but to build a future: "The most irritating part," he wrote, "is that I consider all the work being done now as having no chance. But it has to be done with all due care all the same, so that others, and we ourselves, can't blame ourselves for having missed any chance."⁹

The pentimenti of political protest, like those of art, are often imperceptible in the present tense. When I considered history, I began to see my litigation as part of a community of memory. When I used the law to protest, I remembered the abolitionist, suffragist, antisegregationist lawyers whose actions helped construct a uniquely American culture of litigating broad political issues in court. I remembered courageous lawyers like Moltke, whose failures inspired others. And my community of memory also included the more recent anti–Vietnam War litigators who brought every imaginable lawsuit to try to bring that catastrophic war to an end and who lost every case—but who laid the groundwork for all the work we did at the Center for Constitutional Rights and the National Lawyers Guild in the 1980s. Moreover, my community of memory was not limited to a legal tradition. It included the aspirations and values of people—black people in the Americas in the "river of struggle," Jews in Warsaw who refused to surrender, and many, many others—whose lives informed not only my legal work but also my spiritual and moral choices. Their example was like the words from the Old Testament that began to resonate for me: "But let judgment roll down as waters, and righteousness as a mighty stream."

Our society's central metaphor for justice, the traditional scales of justice, connotes the ideals of balance, equipoise, detachment, and congruence. But the prophetic vision of justice articulated by Amos in the Old Testament calls forth the image of a mighty, turbulent, cascading river. This justice is not merely the technical legal process employed to reach a decision, nor even the set of norms that might constitute a just society, but also the continual, turbulent process of struggle. To maintain its meaning, substantive justice must be linked to movement. And, if justice is the mighty stream of struggle against oppression, then losing efforts constitute some of the myriad rivulets that constantly feed that stream and inspire further struggle.

Those who view justice not as a mere norm but as a turbulent river, "a fighting challenge, a restless drive,"¹⁰ are continually operating on the fault line between current reality and human aspiration, between what is and what ought to be.¹¹ Success in navigating the river requires maintaining the tension between reality and aspiration, between what is and what ought to be, between our reach and our grasp. It requires not getting stuck on either bank of the river, neither the muddy bank of reality nor the high cliffs of our dreams.

I am still not sure whether our efforts were successes or failures. They were successful if they inspire others to struggle, to resist injustice together, and to eschew the easier, more "successful" path. They will be successful if they help others, as they helped me, to understand the meaning of our lives as more than winning or losing.



NEW CHEMICAL COMPLEX WOULD DISPLACE SUSPECTED SLAVE BURIAL GROUND IN LOUISIANA'S "CANCER ALLEY"

Sharon Lerner December 18 2019, 11:29 a.m.



A former burial ground thought to contain the remains of slaves has been identified on a Louisiana property where a massive plastic production complex is sited to be built. Human remains along with evidence of grave shafts were identified on land in the St. James Parish where a subsidiary of the Taiwan-based Formosa Plastics Group intends to build 14 facilities to produce plastic bottles, bags, car casings, and synthetic turf, among other products.

Many residents of the area, known as "Cancer Alley," already oppose the construction of the almost 2,400-acre complex on the west side of the Mississippi River on the grounds that it will double the dangerous amount of toxic chemicals in their air and emit more than 13 million tons of carbon pollution each year, making it the biggest new source of greenhouse gas emissions from a petrochemical plant since at least 2012. The discovery of the burial site adds another layer to their outrage.

"That's sacred ground," said Sharon Lavigne, 67, of the plot now covered with sugar cane where people were laid to rest years ago. Lavigne has lived in the area all her life and founded the community group RISE St. James last year to combat the presence of polluting industrial facilities in the parish. "They're saying they don't care about your ancestors. They're slapping us in the face."



Like many other African American residents in the area, Lavigne believes that she is the descendant of slaves who worked on nearby plantations. Yet because of the lack of documentation of the lives – and deaths – of enslaved people, she doesn't know the specifics of where they labored or were buried.

St. James resident Gail Leboeuf was able to track down the grave of only one of her grandparents. She found out that her maternal grandmother was buried on the former Monroe plantation, which is now occupied by a Shell Refinery. She visited the site last year when an African American museum held a ceremony to honor the people buried there. Because some of the graves were marked with stones, it seems likely that they were dug after the Civil War. While it brought some relief to know where her grandmother was laid to rest, Leboeuf said she found it galling that a giant petrochemical company is at once polluting the area and restricting access to her family's remains. "My grandmother wasn't a slave. But she's a slave now on the Shell plantation."

In an emailed statement, a spokesperson for Shell acknowledged that there are two cemeteries on Shell's property adjacent to the refinery and said that "for the safety and security of both visitors and the agricultural farmers on the adjacent property, visitors are asked to contact the Refinery for access to the property for visitation. Since Shell dedicated the cemeteries nearly two years ago, there has not been a single person denied access to visit."

In an emailed response to questions from The Intercept, Janile Parks, Director of Community and Government Relations for FG LA LLC, a subsidiary of Formosa Plastics, wrote that "Upon confirmation of the Buena Vista burial site's location, and per direction from [State Historic Preservation Office], FG fenced in the identified area to protect it. Pending permit approvals and throughout project construction, FG will remain in compliance with the U.S. Army Corps of Engineers, SHPO and all other applicable state and federal requirements to ensure the site remains protected."

Parks also wrote that "FG is respectful of the historical burial ground on its property and remains committed to cooperating with the State Historic Preservation Office (SHPO) to protect it. In regard to the Buena Vista site and the possible Acadia site, FG has worked with the proper state and regulatory authorities every step of the way and will continue to do so."



Sharon Lavigne, center, the director of RISE St. James, sits with her brother, Milton Cayette Jr., at Louisiana's Department of Environmental Quality's public hearing on whether to approve the 15 air permits for Taiwanese company Formosa Plastics in Vacherie, La., on July 9, 2019. Photo: Julie Dermansky

The records of the slaveowners are far more clear. The giant chemical complex, which Formosa is calling the Sunshine Project, is to be built on several former plantations, including Acadia, whose long series of white owners is traceable through land use records, and Buena Vista, where the number of hogs that Benjamin Winchester and his wife, Carmelite Constant Winchester, raised in the 1840s was carefully documented (between 600 and 700).

The burial site is on what was the Buena Vista plantation and was confirmed in a June report written by an environmental consultant hired by Formosa Plastics Group called TerraXplorations Inc. and obtained through the Texas public records law by the Center for Constitutional Rights, a nonprofit legal group that is representing RISE St. James. The consulting company did an archaeological investigation of two sites on the Formosa property and found that the Buena Vista cemetery contained evidence of four human remains, eight potential grave shafts, and 14 posts or post holes. Among the objects found at the site were bones (including a crushed skull), wood fragments, and coffin nails. The consulting company did not find human remains on the other site and concluded that any possible burials there "have been destroyed by previous land use activities." Because there are records of the plantations' owners being buried elsewhere, the people who were buried at the Buena Vista cemetery are thought to be the slaves who worked on the plantations.

While the report confirmed the existence of the burial site in June, a consultant for the Formosa Plastics Group appears to have known that cemeteries of enslaved people were likely on the site as early as July 2018, according to emails the Center for Constitutional Rights obtained from the Louisiana Division of Archaeology. That month, an archaeologist for Cox/McLain Environmental Consulting Inc., which was serving as a consultant to Formosa, emailed with Louisiana State Archaeologist

Charles McGimsey about a 1877-1878 map the state had obtained from an independent researcher that showed evidence of two burial grounds on the Formosa site.

In August 2018, an attorney for Jones Walker named Marjorie McKeithen who was representing Formosa laid out two possible options for the company, according to the emails. The company could fence off the area and mark it with a plaque to prevent any further construction disturbance or remove the human remains and relocate them to another cemetery. McKeithen acknowledged that fencing off the area "would mean that portions of the planned Utilities Plant may have to be relocated, which makes this a very difficult option" for Formosa.

In comments submitted to the Louisiana Department of Environmental Quality on Wednesday, the Center for Constitutional Rights argued on behalf of RISE St. James that prior knowledge of the burial site – and the fact that Formosa didn't share it with community members or the St. James Parish Planning Commission, which approved Formosa's land use application in 2018 – is justification for the state environmental agency to deny Formosa the 15 final permits the company needs to begin construction of the complex.

The comments submitted to LDEQ raised concerns that there are additional burial grounds on the Formosa site. If there are – and they were destroyed by the construction of the plastics complex – "it would cause immense, irreversible harm to the human dignity of historically enslaved people and would be an unforgivable affront to their descendants and communities in the region, including RISE St. James."

The Center for Constitutional Rights demanded that LDEQ deny Formosa's permit applications, thoroughly investigate the possibility of additional slave burial grounds on the site, and attempt to identify the human remains that have been found "as custodians of the legacy of locally enslaved people and carriers of their remarkable stories of survival and unbreakable human dignity against unspeakable odds."

"The vast majority of the industrial facilities in 'Cancer Alley' are on the grounds of former plantations."

The former plantations that Formosa bought in July 2018 are not the only properties once owned by slaveholders that have gone on to become chemical or oil and gas plants. Down the Mississippi River from the Formosa site, Marathon Petroleum's Garyville pipeline station sits on the former San Francisco plantation. The company's tanks are visible from the window of the ornate kitchen in the restored plantation house.

In St. Bernard Parish, PBF Energy's Chalmette plant was built on a former plantation. In St. John the Baptist Parish, DuPont built its big neoprene factory, which is now partially owned by the Japanese company Denka, on a former sugar plantation called Belle Point. And across the river from the Formosa site, land that was once the Uncle Sam sugar plantation is now occupied by Mosaic, a company that produces synthetic fertilizer and has created a 960-acre waste pile and a giant lake of more than 700 million gallons of highly acidic water.

"The vast majority of the industrial facilities in 'Cancer Alley' are on the grounds of former plantations," said Justin Kray, an independent researcher who has been using maps and aerial photography to trace the history of property ownership in St. James for two years. "The areas where large petrochemical companies want to locate are large, undivided tracts of land. And these are the undivided tracts."

Dangerous emissions from petrochemical company development along the Mississippi River between New Orleans and Baton Rouge earned the area its nickname "Cancer Alley" in the 1980s. In the past few years, a second wave of industrial development fueled by the fracking boom has been transforming the region.

As development and dangerous pollution have increased, and as Lavigne of RISE St. James has been working to call attention to it, three of her close colleagues – Geraldine Mayho, Keith Hunter, and Lynn Nicholas – have died.

The planned Formosa complex, which is one mile from an elementary school, is permitted to release more than 800 tons of hazardous air pollutants per year. Among the chemicals the complex will release is ethylene oxide, a carcinogen that has raised cancer risk in more than 100 census tracts around the country.

Recognition of the local risk led to the recent closure of plants that emitted the chemical in Georgia and Illinois. But Formosa's St. James complex is permitted to release 7.7 tons of the cancer-causing gas each year.

"While the rest of the country is trying to reduce or eliminate ethylene oxide emissions, this state is creating a brand-new toxic problem," said Corinne Van Dalen, a staff attorney at Earthjustice, which submitted comments to LDEQ on the proposed facility on behalf of a number of environmental groups, including RISE St. James, Louisiana Bucket Brigade, Sierra Club, Center for Biological Diversity, Healthy Gulf, Earthworks, No Waste Louisiana, and 350 New Orleans.

As with the other pollution in the area, the brunt of this toxic problem will fall on the African Americans descendants of the enslaved people who worked – and were buried – on the plantations where the plastic complex will be erected.

Update: December 18, 2019

This article has been updated with a statement from FG LA, LLC that was received after publication.

WAIT! BEFORE YOU GO about your day, ask yourself: How likely is it that the story you just read would have been produced by a different news outlet if The Intercept hadn't done it?

Consider what the world of media would look like without The Intercept. Who would hold party elites accountable to the values they proclaim to have? How many covert wars, miscarriages of justice, and dystopian technologies would remain hidden if our reporters weren't on the beat?

The kind of reporting we do is essential to democracy, but it is not easy, cheap, or profitable. The Intercept is an independent nonprofit news outlet. We don't have ads, so we depend on our members – 35,000 and counting – to help us hold the powerful to account. Joining is simple and doesn't need to cost a lot: You can become a sustaining member for as little as \$3 or \$5 a month. That's all it takes to support the journalism you rely on.

DONATE NOW \rightarrow

RELATED



A Louisiana Town Plagued by Pollution Shows Why Cuts to the EPA Will Be Measured in Illnesses and Deaths



How Pollution Killed a Louisiana Town

20 Tools for Movement Lawyering

By Bill Quigley is a human rights lawyer and law professor at Loyola University New Orleans. Work for and with Organizations, Not Issues: This is Not Impact Litigation or Law Reform Understand the Goal of Movement Legal Work is to Help Build the Power of the Organization Organizations Make the Decisions about the Legal Work, Not the Lawyers: Just Like Paying Clients Learn to be a Swiss Army Knife not a Hammer There are No Voiceless: Lift Movement Voices as Primary Speakers Lawyers Take Back Seat with Media Help Organizations Fight for Public Participation, Demand Public Meetings and Hearings Help Organizations Fight for Transparency, Demand Release of Public Information Help Organizations in Public Confrontations Help Organizations Get Publicity and Lift up Community Leadership Help Organizations with Investigations and Fact Sheets Help Organizations Raise Money to Sustain the Movement Never Say "No, you cannot do that" Help Organizations Dismantle and Radically Restructure Current Systems of Law and Power Help Organizations Work to Destroy White Supremacy and Institutional Racism Lawyers Can Disempower Organizations: Understand and Fight Lawyer Privilege and White Privilege Prepare to Be Regularly Uncomfortable Be Prepared to Journey with Community and that includes Uncertainty, Conflict, and Chaos Learn and Understand Building Community Power through Organizing Learn About Other Movements and Learn How Social Change Happens Rediscover Humility, True Partnership and Respectful Relationships in Solidarity for Liberation